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Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

LISA MILLER-JENKINS,
*Petitioner,*

*v.*

JANET MILLER-JENKINS,
*Respondent.*

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On Petition for Writ of Certiorari to the Virginia Court of Appeals

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## PETITION FOR WRIT OF CERTIORARI

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Mathew D. Staver
*(Counsel of record)*
Anita L. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons
Second Floor
Maitland, FL 32751
(800) 671-1776

Stephen Crampton
Rena M. Lindevaldsen
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
100 Mountain View Road
Suite 2775
Lynchburg, VA 24502
(800) 671-1776
*Attorneys for Petitioner*

## QUESTIONS PRESENTED

1. Whether the jurisdictional preference provided in the Parental Kidnaping Prevention Act to the first state issuing a custody determination consistent with the PKPA deprives a second state from issuing a conflicting parentage determination where the custody determination arose from a same-sex civil union and the second state, pursuant to the federal Defense of Marriage Act, has expressly adopted laws refusing recognition of rights or claims arising from same-sex unions.

2. Whether the later-enacted federal Defense of Marriage Act, which codified a state's power to refuse to give full faith and credit to rights arising from same-sex unions treated as marriage rather than the Parental Kidnaping Prevention Act, which does not address same-sex unions, controls full faith and credit decisions involving parentage and custody rights arising from a same-sex civil union in a state that has expressly adopted laws refusing recognition of rights or claims arising from same-sex unions.

3. Whether the Parental Kidnaping Prevention Act, which affords custody and visitation orders full faith and credit, or the Defense of Marriage Act, which does not require full faith and credit be afforded to rights arising from same-sex unions treated as marriage, controls when a receiving state is asked to give full faith and credit to parentage and custody rights arising from a same-

sex union and the receiving state's laws expressly declare the same-sex union "void in all respects."

4. Whether a receiving state's order giving full faith and credit to a sister state's award of parentage rights to the biological mother's former same-sex civil union partner over the objections of the child's fit, biological mother violates the federal parental rights of the biological mother when the receiving state, where the mother conceived the child and continues to live with the minor child, does not recognize same-sex unions.

5. Whether an award of parentage rights to a legal stranger, over the objections of a fit, biological parent, infringes the constitutional rights of a fit parent.

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## OPINIONS BELOW

The opinion of the Virginia Court of Appeals is reported at 637 S.E.2d 330. (App. 1a-19a). The order of the Virginia Court of Appeals denying the motion for rehearing *en banc* is unreported. (App. 57a-58a). The order of the Virginia Supreme Court dismissing the petition for appeal is unreported. (App. 20a-21a). The order of the Virginia Supreme Court denying the petition for rehearing is unreported. (App. 59a-60a). The Circuit Court's order concerning jurisdiction and certification for interlocutory appeal is unreported. (App. 22a-25a). The Circuit Court's final order concerning parentage is unreported. (App. 26a-28a).

## JURISDICTION

The opinion of the Virginia Court of Appeals was filed on November 28, 2006. A motion for rehearing *en banc* was denied on January 19, 2007. The Virginia Supreme Court dismissed the Petition for Appeal on May 7, 2007.[1] The Virginia Supreme Court

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[1]Under Virginia law, this case was "final, without appeal to the Supreme Court," unless the Virginia Supreme Court determined from a petition for review that the case "involve[d] a substantial constitutional question as a determinative issue or matters of significant precedential value." Va. Code § 17.1-410. Petitioner requested the court to find that this case fell within the exception to finality. In mid-March, the clerk informed Petitioner that a Notice of Appeal should have been filed with the Court of Appeals despite the plain language of Virginia Supreme Court Rules 5:14 and 5:17, which states that pursuant to Va. Code § 17.1-410 Appellant has *no right to petition* for

denied a Petition for Rehearing on June 22, 2007. On September 11, 2007, the Chief Justice granted an extension of time to file this Petition until November 19, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Fourteenth Amendment to the United States Constitution; the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A; the Defense of Marriage Act, 28 U.S.C. § 1738C; 15 V.S.A. §§ 5, 6, and 1204; the Virginia Constitution, article I, § 15-A; and Va. Code §§ 20-45.3 and 20-158. The constitutional and statutory provisions involved are each set out, in relevant part, verbatim with appropriate citations in Appendices J through S, (App. 61a-78a).

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appeal to the Supreme Court *unless* the "Court determines that the petition involves a substantial constitutional question as a determinative issue or matters of precedential value . . . ." Va. Code § 17.1-410(B). The rules state that those with a *right* to petition for appeal must file a Notice of Appeal with the Court of Appeals. Because Petitioner did not have a right to petition for appeal, she did not file a notice of appeal. The clerk informed counsel for Petitioner that *despite* the plain wording of the rules, the court requires a person filing a discretionary petition for appeal to act as if she had a right to file a petition for appeal. As a result, Petitioner moved that court to accept the Petition as presented, stressing that the clerk's interpretation of the rules does not appear anywhere in writing and is contrary to the face of the rules. By order dated May 7, 2007, the court dismissed the petition.

## STATEMENT OF THE CASE

This case presents two related, but independent, substantial federal issues: the sovereign power of one state to refuse to give full faith and credit to a sister state's custody order arising from a same-sex union; and the constitutional right of a fit, biological parent to decide whether a legal stranger should be treated as a parent to the biological mother's child. In particular, this case concerns the statutory and constitutional rights of Petitioner, Lisa Miller ("Lisa"), the fit, biological mother of five year old Isabella to decide whether Respondent, Janet Jenkins ("Janet"), who has no biological or adoptive relationship to Isabella, should be treated as a parent to Lisa's child. Until court-ordered visitation began in July 2007, Janet had had no regular contact with Isabella since Isabella was seventeen months old.

Lisa and Janet lived together in Virginia in the late 1990s. In December 2000, while Virginia residents, they traveled to Vermont to enter into a same-sex civil union and immediately returned to Virginia. (App. 42a). In 2001, Lisa was artificially inseminated in Virginia, by a Virginia doctor, with sperm from an anonymous donor. (App. 42a-43a). Janet did not provide any genetic material for the insemination. (App. 44a).

Lisa gave birth to Isabella in Virginia in April 2002 and is the sole parent listed on Isabella's Virginia birth certificate. In August 2002, Lisa, Janet, and Isabella moved to Vermont. (App. 43a). Janet never even attempted to adopt Isabella. When

her relationship with Janet ended in September 2003, Lisa returned home to Virginia with Isabella. (App. 44a.). Janet continued to live in Vermont.

Wanting to dissolve her civil union, in November 2003, Lisa *pro se* filed forms in Vermont to dissolve the civil union. (App. 2a-3a). Vermont was the only place she could dissolve the civil union because no other state recognized a Vermont civil union as valid.[2] The *pro se* complaint form asked whether there were "biological or adoptive children of said civil union." Lisa, who gave birth to Isabella during the civil union, listed Isabella in response to that question. Janet counterclaimed, seeking full custody of Lisa's biological child, never even alleging that Lisa was an unfit mother.

On June 17, 2004, the Vermont court entered a "temporary order re: parental rights and responsibilities." (the "Temporary Custody Order") (App. 33a). The court awarded Lisa "legal and physical responsibility" of her child but, over Lisa's objection, and without deciding whether Janet was a parent to Isabella, granted Janet temporary "parent child contact." (App. 34a). Lisa was ordered to give Janet one week each month of unsupervised visitation with then two-year old Isabella in Vermont

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[2] *See, e.g., Rosengarten v. Downes*, 802 A.2d 170 (Conn. Ct. App. 2002) (holding that Connecticut lacked jurisdiction to dissolve a civil union because Connecticut law did not treat civil unions as valid).

beginning in August 2004.[3] (*Id.*). On July 1, 2004, Lisa filed a petition in a Virginia circuit court asking the court to declare her Isabella's sole parent pursuant to Virginia's assisted fertilization statute.

On September 2, 2004, the Vermont family court found Lisa in contempt of the temporary order re: parental rights and responsibilities. That court still had not determined whether Janet was a "parent." On September 9, 2004, the Virginia circuit court entered an order confirming its jurisdiction, finding that nothing in the Parental Kidnaping Prevention Act (PKPA) precluded it from exercising jurisdiction over the parentage action. (App. 22a). In particular, the Virginia court found that "[a]ny claim of parentage by Respondent under Vermont law is necessarily based on Respondent's civil union with Petitioner," and that any such rights are null and void under Virginia law. (App. 23a-24a). On October 15, 2004, that court entered final judgment of sole parentage in Lisa's favor. (App. 26a).

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[3] A final order granted Lisa sole legal and physical responsibility, with scheduled, liberal visitation to Janet. That order cautioned, however, that custody could be switched to Janet if Lisa did not foster a good relationship between Isabella and Janet. *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03Rddm, June 15, 2007 Findings of Fact, Conclusions of Law, and Order ("Continued interference with the relationship between IMJ and Janet could lead to a change of circumstances and outweigh the disruption that would occur if a change of custody were ordered"). A post-trial entry order also prohibits each party "from making statements or comments in the presence of IMJ that are critical of the lifestyle, sexual orientation, or religious persuasion of the other party, or otherwise are intended to, or have the effect of, alienating IMJ from the other party." *Miller-Jenkins v. Miller-Jenkins*, No. 454-11-03Rddm, September 28, 2007 Entry Order.

One month later, the Vermont trial court belatedly reached the parentage question, declaring Janet a parent to Isabella. After explaining that, "Vermont has not yet been presented with the question of parental status concerning a child born during a marriage [or civil union] and conceived through artificial insemination," the court created a new parentage rule and applied it retroactively. It declared that "where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and to raise the child as one's own as part of a family unit, not by biology." (App. 50a-51a). On December 21, 2004, the Vermont trial court refused to give full faith and credit to the October 15, 2004 Virginia parentage order, which was entered one month *before* the Vermont court first reached the issue.

On August 4, 2006, the Vermont Supreme Court affirmed the rulings and remanded the case to the trial court to determine custody and visitation. The Vermont Supreme Court denied a petition for reargument on November 9, 2006.[4] On November 28, 2006, relying heavily on the Vermont Supreme Court decision, a panel of the Virginia Court of Appeals reversed the Virginia circuit court order. (App. 1a). The Virginia Court of Appeals concluded that, despite Virginia's prohibition against recognizing any rights flowing from same-sex unions, the PKPA deprived

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[4] A petition for certiorari to the Vermont Supreme Court was denied. No. 06-1110. The Virginia Attorney General filed an amicus brief in support of Petitioner.

Virginia of jurisdiction to enter a parentage order after Vermont had already issued the Temporary Custody Order. (App. 17a-18a).

Ignoring the protections codified by DOMA, the court stated to the extent that Virginia marriage laws required a different result, they were preempted by the PKPA. That order is the subject of this Petition. By order dated January 19, 2007, the Virginia Court of Appeals denied a petition for rehearing *en banc*. The Virginia Supreme Court dismissed the Petition for Appeal on May 7, 2007,[5] and denied a Petition for Rehearing on June 22, 2007.[6]

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[5] *See supra* note 1 (explaining basis for dismissal).

[6] In March 2005, Janet sought to register the temporary custody order in Virginia. The circuit court refused to register the order, again citing to DOMA and Virginia law, which does not recognize any rights as legal that arise from a same-sex civil union. However, adopting the rationale set forth in its November 2006 opinion, the Court of Appeals concluded Virginia must register the order. In August 2007, the Virginia Supreme Court granted Lisa's petition for review of that decision. The matter is presently being briefed by the parties. The Virginia Attorney General has submitted an amicus brief in support of Lisa's position that Virginia cannot give full faith and credit to the Vermont orders. Although the two cases present similar issues, the first Virginia case, which is the subject of this Petition, primarily addresses the issue of whether Virginia had jurisdiction to make the parentage determination after Vermont had issued the temporary custody order. The second Virginia case, presently before the Virginia Supreme Court, squarely addresses the issue of whether Virginia can refuse to give full faith and credit to the Vermont custody order under the authority of DOMA and Virginia's marriage laws. Both cases

**Federal Questions Presented in State Proceedings**

Petitioner presented in the courts below the various arguments concerning the scope and application of the PKPA, on the one hand, and the DOMA and Virginia marriage laws on the other. Indeed, the Court of Appeals' decision demonstrates that Petitioner presented the argument that in light of Virginia's laws prohibiting recognition of rights or claims arising from same-sex unions, the PKPA does not force Virginia to recognize Vermont's custody determination concerning a child born in Virginia to a Virginia resident at the time the mother was in a same-sex civil union in Virginia. (App. 14a).

Petitioner also raised the parental rights argument. The July 1, 2004 "Petition to Establish Parentage" alleges that "Respondent has claimed parentage by virtue of the civil unions, and seeks to deny, infringe, and/or restrict Petitioner's parental right, through, inter alia, the aforementioned [Vermont] judicial proceedings." (¶ 12).

Petitioner's February 16, 2005 response brief to the Court of Appeals also specifically argued that the Circuit Court determination was correct and if the Court of Appeals reversed the circuit court determination, the Court of Appeals' order would itself constitute a violation of Lisa's fundamental

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present the parental rights claim. This Court has authority to hold this petition pending the Virginia Supreme Court ruling, at which time a petition by either party may be consolidated with this petition.

parental rights, in the same manner as the Vermont orders infringed Petitioner's parental rights.(at 2, 27-30) ("The Virginia court also properly took jurisdiction of the parentage action because failure to do so would have resulted in infringement of Lisa's constitutional rights to raise her biological child as she sees fit;" "An award of parentage, custody, or visitation in favor of Janet over Lisa's objections violates Lisa's constitutional parental rights.").[7]

## REASONS FOR GRANTING THE WRIT

This petition should be granted for two reasons. First, this case involves an important question of federal law that has not been, but should be, decided by this Court concerning the scope and effect of two federal statutes, the federal DOMA and the earlier-enacted PKPA, both of which are located in the same section of Title 28 of the United States Code. *See* 28 U.S.C. §§ 1738A (PKPA) and 1783C (DOMA). DOMA recognizes state sovereignty under the Full Faith and

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[7] Lisa's argument raises another PKPA issue over which states have reached conflicting results. The text of the PKPA requires a state to give full faith and credit to child custody determinations from another state. The definition of child custody determinations does not include parentage actions. Thus, Lisa argued that even if Vermont had proper jurisdiction to maintain the *child custody* proceeding, nothing in the PKPA prevented Virginia from taking jurisdiction to hear a *parentage* action. (App. 12a); *See, e.g., L.G. v. Colorado*, 890 P.2d 647 (Colo. 1995) (*en banc*); *Sheila L. v. Ronald P.M.*, 465 S.E.2d 210, 221 (W. Va. 1995) ("The parentage action in Ohio was not a 'custody determination' as defined by the PKPA").

Credit Clause (FFC) so that one state is not directly or indirectly compelled by a sister state to redefine its own definition of marriage. Confusion over the interplay between the PKPA and DOMA caused the Virginia Court of Appeals to declare that *it had no choice* but to give full faith and credit to the Vermont custody order even though, consistent with DOMA, Virginia law expressly prohibits recognition of any rights flowing from same-sex unions. (App. 11a, 17a). As a result, the Court of Appeals held that the PKPA deprived Virginia from exercising jurisdiction over the July 1, 2004 parentage action. (App. 16a-17a).

In passing DOMA, Congress invoked its authority under the FFC to prescribe "what (if any) effect" states must give to "any public act, record, or judicial proceeding . . . respecting a relationship between persons of the same-sex that is treated as marriage under the laws of such other state . . . or a right or claim arising from such relationship." 28 U.S.C. § 1738C; H.R. Rep. 104-664, at 27, 1996 U.S.C.C.A.N. 2905, 2932. DOMA, which was passed by an overwhelming majority and signed into law by President Clinton in 2000, provides that each state can determine for itself what legal effect to give to: (a) same-sex marriages or same-sex relationships treated as marriage, but not called marriage; and (b) rights or legal claims arising from same-sex marriages or same-sex relationships treated as marriage.

Consistent with DOMA, more than forty-four states have enacted laws and passed constitutional amendments prohibiting legal recognition of same-sex unions. Confused over the scope and effect of the

PKPA, the Court of Appeals' decision eviscerated the protections afforded Virginia under DOMA and Virginia law. Specifically, the Virginia Court of Appeals interpreted the PKPA to impose a *per se* obligation to give full faith and credit to parentage and child custody determinations even where those parentage and custody rights arise from a same-sex relationship treated as marriage and are considered void under Virginia law. The PKPA's scope, however, is not that expansive.

The PKPA does not require Virginia to give full faith and credit to Vermont orders granting visitation and parental rights to a woman with no biological or adoptive relationship to a child because she was in a civil union relationship with the biological mother at the time the child was conceived and born. Virginia law declares rights arising from same-sex unions as void in all respects. This Court should resolve the important federal questions concerning the proper interpretation of the PKPA and DOMA to prevent further interstate conflicts in matters of traditional state concern. *See Mansell v. Mansell*, 490 U.S. 581, 587 (1989) ("[d]omestic relations matters "are preeminently matters of state law"); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

The writ should also be granted to resolve a pervasive split among the states on the scope of parental rights after *Troxel v. Granville*, 530 U.S. 57 (2000). At least sixteen states, including Vermont in Petitioner's case, have judicially appointed *de facto* or psychological parents over the objections of fit, biological parents. Conversely, at least twelve states

have reached the opposite conclusion. The important question of federal law concerning the rights of fit, biological parents in the face of claims of *parentage rights*, rather than visitation rights, by third parties should also be settled by this Court.

It bears emphasis that the case presented to this Court is *not* a domestic relations case. Petitioner does not ask this Court to issue a divorce decree, decide custody, or award alimony. Rather, Petitioner asks this Court to clarify existing confusion over the scope and effect of the PKPA and DOMA in order to prevent further interstate conflicts.[8] Confusion over these two federal statutes has embroiled Virginia and Vermont in more than three years of litigation, most of which could have been avoided with guidance from this Court on the proper interpretation of the statutes. Although this case presents an issue of first impression, given the increased number of states treating same-sex unions as marriage, expressly prohibiting recognition of those unions, or declaring

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[8] Although this case does not present the type of "intractable jurisdictional deadlock[]" envisioned by this Court in concluding that the PKPA does not confer a private right of action, review should nevertheless be granted. *See Thompson v. Thompson*, 484 U.S. 174, 187 (1988). First, the case involves an important question of federal law that needs to be addressed by this Court. Second, had the scope of the PKPA, DOMA, and Virginia's marriage laws been properly construed, a conflict would exist between Virginia and Vermont. Virginia law expressly prohibits recognition of any rights arising out of same-sex marriages or civil unions. The Virginia Court of Appeals erroneously ruled that the PKPA, not the DOMA, controlled, and that it pre-empted state law to the contrary.

third parties *de facto* parents, the federal issues presented are of nationwide significance and urgency.

This case presents one of those "rare instances . . . in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue . . . ." *Elk Grove*, 542 U.S. at 13; *see also Palmore v. Sidoti*, 466 U.S. 429, 432-34 (1984) (reviewing child custody determination because it raised important federal concerns concerning race discrimination).

## I.

## THE DECISION BELOW EVISCERATES THE PROTECTIONS AFFORDED BY DOMA AND VIRGINIA'S MARRIAGE LAWS.

### A. Virginia Mistakenly Concluded That The PKPA Made Child Custody Determinations Exempt From, Instead of Subject To, DOMA And Existing Full Faith and Credit Clause Jurisprudence.

According to the Virginia Court of Appeals, the PKPA imposes a *per se* obligation on sister states to give full faith and credit to Vermont parentage and custody orders, thereby depriving Virginia from exercising jurisdiction to issue parentage or custody determinations concerning Isabella, regardless of how offensive the Vermont order is to Virginia law. Even though Virginia exercised its sovereign right to enact the strongest prohibition in the nation against recognition of same-sex civil unions, the Court of

Appeals decision wrongly decided that the PKPA renders that choice virtually meaningless.

Consistent with that logic, if one state declared a child to have three parents – two moms and a dad – and granted custody rights to each, the PKPA would obligate sister states to give full faith and credit to those custody and parentage determinations regardless of how offensive the orders are to the receiving state's express public policy. Similarly, as happened in this case, even though Virginia declares rights arising from same-sex unions as void in all respects, the Virginia court concluded that the PKPA deprived Virginia of jurisdiction to determine parentage for Isabella, instead requiring Virginia to give full faith and credit to Vermont's decision to treat Janet as a parent to Lisa's biological child because the two women were in a civil union at the time Isabella was born in Virginia.

Because of its confusion over the PKPA, the Virginia court concluded that the PKPA required Virginia to substitute Vermont's laws for Virginia's laws and constitutional provisions that expressly prohibit recognition of same-sex civil unions. The PKPA did not strip states of the sovereign power to determine for themselves issues touching on intimate matters of traditional state concern.

Rather, the PKPA places child custody orders within the existing FFC jurisprudence, subject to the longstanding public policy exception to full faith and credit. When Congress enacted the PKPA in 1980, it met the unique challenge facing the nation as a result of states that refused to enforce custody orders, which by their nature were non-final. *See Thompson*

*v. Thompson*, 484 U.S. 174, 180 (1988) (some courts doubted whether custody orders were sufficiently "final" to trigger full faith and credit requirements).

While the PKPA requires states to treat child custody orders *the same* as other final orders for purposes of the full faith and credit obligation, generally preventing the receiving state from modifying the order, the obligation to give full faith and credit also remains subject to *the same* longstanding public policy exception. *See* S. Rep. 103-361, at 4, 1994 U.S.C.C.A.N. 3259, 3261; *see also Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Mason v Mason*, 775 N.E.2d 706, 709 & n.3 (Ind. Ct. App. 2002) (stating general rule that courts will give full faith and credit to marriage validly contracted in the place where it is celebrated, unless it violates strong public policy); Ala. Op. Att'y Gen. No. 2000-129, 2000 WL 33310632, at *7 (Apr. 20, 2000) ("the Full Faith and Credit Clause would not require the State of Alabama . . . to recognize any form of homosexual 'marriage' that might be conducted in the future under the laws of the state of Vermont, whether the relationship were legally styled a 'marriage,' a 'civil union,' or a 'domestic partnership.'"). The PKPA simply leveled the playing field with respect to child custody orders.

This Court has explained that because the PKPA is an addendum to the FFC Act is itself "strong proof" Congress intended child custody orders to have the *same* operative *effect* as other acts, records, and judicial proceedings that fall within the mandate of the FFC Act.

[I]t seems highly unlikely Congress would

> follow the pattern of the Full Faith and Credit Clause and section 1738 by structuring section 1738A as a command to state courts to give full faith and credit to the child custody decrees of other states, and yet, without comment, depart from the enforcement practice followed under the Clause and section 1738.

*Thompson*, 484 U.S. at 183. Absent an express intent to abrogate the public policy exception to the FFC, that "enforcement practice" under the FFC must include application of the public policy exception to the full faith and credit obligation. *Cf. Thompson*, 484 U.S. at 187 ("state courts faithfully administer the full faith and credit clause every day; now that Congress has extended full faith and credit requirements to child custody orders, we can think of no reason why the courts' administration of federal law in custody disputes will be any less vigilant."). Ignoring the history and purposes of the PKPA, the Virginia Court of Appeals incorrectly treated the PKPA as imposing a *per se* full faith and credit obligation.

### B. The Virginia Court Ignored The Fact That DOMA Codified a State's Sovereign Power to Define and Regulate Marriage and Family.

In 1996, as Hawaii considered whether to redefine marriage to include same-sex marriage, Congress passed DOMA to prevent one state from forcing other states to adopt same-sex unions.

Congress relied on longstanding Supreme Court precedent to reach its conclusion that, even without DOMA, each state had the sovereign power to determine what, if any, legal effect to give to same-sex relationships entered into in sister states. The legislative history confirms that Congress did not want any doubt to remain concerning that power. As a result, Congress invoked its authority under the FFC to prescribe "what (if any) effect" states must give to same-sex unions. 28 U.S.C. § 1738C; H.R. Rep. 104-664, at 27, 1996 U.S.C.C.A.N. 2905, 2932. DOMA reiterates that each state can determine for itself what legal effect to give to: (a) same-sex marriages or same-sex relationships treated as marriage, but not called marriage;[9] and (b) rights or legal claims arising from same-sex marriages or same-sex relationships treated as marriage.

DOMA recognizes that "domestic relations are preeminently matters of state law." *See Elk Grove*, 542 U.S. at 12. The powers retained by the states under our Constitution "are numerous and indefinite . . . . The powers reserved to the several states . . . extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties

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[9] It bears noting that at the time Congress enacted DOMA, no state had yet provided legal recognition to same-sex unions in a manner comparable to that provided now by Massachusetts (same-sex marriage), Vermont (civil unions), or California (domestic partnerships that are provided all the benefits of marriage). Congress, therefore, not concerned with the *label* but the *effect* of the relationship, specifically sought to protect a state's right to refuse to give full faith and credit to same-sex unions regardless of the name given by the state.

of the people, and the internal order, improvement, and prosperity of the state." The Federalist, No. 45, at 289 (Clinton Rossiter, ed. 1961). In contrast, "[t]he powers delegated . . . to the federal government are few and defined. . . . [The federal powers] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce. . . ." *Id.* Given this division of powers, it is no surprise that this Court has explained that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *Rose v. Rose*, 481 U.S. 619, 625 (1987). Codifying a State's sovereignty over domestic relations matters, DOMA provides that

> No State . . . shall be required to *give effect* to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim *arising from* such relationship.

28 U.S.C. § 1738C (emphasis added).

A House Report from the Judiciary Committee confirms that Congress passed DOMA to remove any doubt about a state's power to refuse to give full faith and credit to a sister state's order that would undermine the receiving state's power to define marriage and family for itself. *See* Lynn D. Wardle, *Tyranny, Federalism, and the Federal Marriage Amendment*, 17 Yale L. J. & Feminism 221 (2005). The Report explains that

> [W]e simply cannot know exactly how courts will rule on the Full Faith and Credit Clause

> issue. As a result, we are confronted now with significant legal uncertainty concerning this matter of great importance to the various States. While the Committee does not believe that the Full Faith and Credit Clause, properly interpreted and applied, would require sister States to give legal effect to same-sex marriages celebrated in other States, there is sufficient uncertainty that we believe congressional action is appropriate.

H.R. Rep. 104-664 at 24, 1996 U.S.C.C.A.N at 2929. Congress was "not content to rely on the amorphous 'public policy' exception" in order to protect a state's right to decline to give full legal effect to same-sex relationships treated as marriage in another state. *Id.* at 27, 1996 U.S.C.C.A.N. at 2914.

Congress further clarified that it was concerned about much more than whether a marriage license or civil union certificate would be valid in a second state.

> In the abstract, it is difficult to know precisely what consequences would result if a same-sex couple from, say, Ohio, flew to Hawaii, got "married," returned to Ohio, and demanded that the State or one of its agencies give effect to their Hawaiian "marriage" license. . . . In general, the Committee believes that at least two things would occur.
>
> First, the State law regarding marriage would be thrown into disarray, thereby frustrating the legislative choices made by that State that support limiting the institution of marriage to

> male-female unions. . . . Second, in a more pragmatic sense, homosexual couples would presumably become eligible to receive a range of governmental marital benefits. For example, in *Baehr v. Lewin*, the court listed fourteen specific "rights and benefits" that are available only to married couples (listing benefits related to income tax; public assistance; community property; dower, courtesy [sic], and inheritance; probate; ***child custody*** and support payments; spousal support; premarital agreements; name changes; nonsupport actions; post-divorce rights; evidentiary privileges; and others).

*Id.* at n.21 (emphasis added) (citations omitted). Sixteen years after the PKPA, Congress enacted DOMA – *placing it in the same statutory section as the PKPA* – to clarify a state's authority to refuse to give legal effect to child custody orders arising from same-sex unions treated as marriage.

Despite Congress' attempt to clarify the scope of a state's sovereign power to define and regulate domestic relations matters, the Virginia court ignored the protections recognized by DOMA, and misconstrued the *previously enacted* PKPA to impose a *per se* full faith and credit obligation. As a result, the Virginia Court of Appeals concluded that Virginia has no choice but to ignore Virginia's marriage laws prohibiting recognition of any rights flowing from same-sex unions and to acquiesce in Vermont's contrary public policy choices concerning marriage and family.

### C. Absent Intervention From This Court, Vermont Will Set Marriage Policy for the Nation, in Contravention of the Express Will of Congress.

Vermont treats same-sex unions similar to marriage. Under DOMA, one state cannot be forced to give full faith and credit to a right or claim arising from a same-sex relationship treated as marriage. Because the Virginia court failed to comprehend the significance of DOMA, it erroneously concluded that Virginia must acquiesce in Vermont's same-sex union law. Specifically, the Virginia court held that the PKPA deprived Virginia of jurisdiction to declare parentage of a Virginia-born resident because Vermont had just weeks earlier issued a temporary custody order treating Janet as Isabella's mother. DOMA, however, expressly provides that one state cannot force another state to give full faith and credit to court orders "respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other state . . . or a right or claim arising from such relationship." 28 U.S.C. § 1738C. Rather, each state makes its own determination concerning rights afforded to same-sex unions.

The Court of Appeals' decision is especially egregious given Virginia's express public policy against any recognition of same-sex relationships. Virginia's Marriage Affirmation Act ("MAA") provides that:

> A civil union, partnership contract or other arrangement between persons of the same sex

> purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement into by persons of the same sex in another state or jurisdiction ***shall be void in all respects*** in Virginia and any contractual rights created thereby shall be void and unenforceable.

Va. Code § 20-45.3 (emphasis added). On November 7, 2006, the Virginia electorate voted to amend the Commonwealth's constitution to provide, in relevant part:

> This Commonwealth . . . shall not create or recognize a legal status for relationships of unmarried individuals that ***intends to approximate*** the design, qualities, significance, or ***effects of marriage***. Nor shall this Commonwealth or its political subdivisions create or ***recognize another union***, partnership, or other legal status to which is assigned the ***rights, benefits***, obligations, qualities, ***or effects of marriage***.

Va. Const. art. I, § 15-A (emphasis added).

Virginia law does not carve out any exceptions – any and all rights, benefits, and obligations flowing from a civil union are void in Virginia. Vermont civil unions fall squarely within the scope of DOMA and Virginia's marriage laws. Vermont law states that "parties to a civil union shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage . . . ." 15 V.S.A. § 1204(a). With respect to children born during the civil union relationship, Vermont law states that

the "rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple with respect to a child of whom either spouse becomes the natural parent during the marriage." 15 V.S.A. § 1204(f).

Under Virginia law, the Vermont custody order is void because the rights granted to Janet under that order are inextricably tied to the underlying civil union. Janet is not a biological or adoptive parent to Isabella. Vermont's conclusion that Janet is a parent is a legal fiction principally resting on the fact that Janet and Lisa were in a civil union at the time Isabella was born *in Virginia*. *See Miller-Jenkins v. Miller-Jenkins*, 2006 VT 78, ¶ 56, 912 A.2d 951 (Vt. Sup. Ct. 2006) ("[m]any factors are present here that support a conclusion that Janet is a parent, including, ***first and foremost***, that Janet and Lisa were in a valid legal union at the time of the child's birth"; "the couple's legal union at the time of the child's birth is *extremely persuasive* evidence of joint parentage" (emphasis added)).

The Virginia Court of Appeals' decision highlights the confusion that exists over the scope and effect of the PKPA and DOMA that needs to be resolved by this Court. The Virginia panel asked only whether DOMA repealed by implication the mandate of the PKPA to give full faith and credit to custody determinations. (App. 13a-15a). It never considered the key question of whether the PKPA repealed by implication a state's right to invoke the public policy exception, which was then later codified in DOMA. *See Scott v. Lichford*, 164 Va. 419, 422, 180 S.E. 393,

394 (1935) ("repeal by implication is not favored and the firmly established principle of law is that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each."). Based on its inaccurate interpretation of the PKPA, the Virginia Court of Appeals concluded that to the extent the MAA applies to the case, it is preempted by the PKPA.[10] (App. 17a).

The results of this misunderstanding are not only far-reaching but illogical, rendering DOMA meaningless. Absent intervention by this Court, sister states will be required to give full faith and credit to a variety of orders,[11] despite strong, express, public policy to the contrary, including adoption decrees,[12] parentage orders, custody determinations,

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[10] The Virginia court inexplicably stated that "[n]othing in the wording or legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations." (App. 16a).

[11] The ripple effect throughout the nation is magnified by the fact that Vermont refuses to apply its marriage evasion statute to civil union couples. *Cf.* 15 V.S.A. § 6 (marriage is void in Vermont if contracted by nonresidents where the marriage would be void in their home state); 15 V.S.A. § 5 (marriage is void in Vermont if contracted by Vermont residents in another state in an effort to evade Vermont marriage restriction). With more than 80% of Vermont civil unions entered into by non-residents, it is only a matter of time before additional interstate judicial conflicts arise.

[12] An Oklahoma federal district court judge recently struck down a 2004 Oklahoma law prohibiting recognition of an adoption in

nuptial agreements,[13] spousal support payments, and child support payments. *But see Cook v. Cook*, 104 P.3d 857, 863 (Ariz. Ct. App. 2005) ("Unless constitutionally required, Arizona should not be held hostage to the policies of another state on a subject so vital as who may or may not marry").

When, as here, a federal statute is incorrectly interpreted by state courts to usurp a state's power to regulate the most intimate of domestic relations matters, federal courts must intervene to restore the proper balance of powers. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring). Intervention by this Court is necessary to restore to states their power to define what is marriage and who is a parent.

This Court should grant the petition to resolve the interplay between the PKPA and the DOMA where courts address parentage, custody, and other rights that arise under a state's same-sex marriage or union law when the law and policy of an affected sister state prohibits recognition of same-sex unions.

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another state by more than one person of the same-sex, declaring that adoption decrees from sister states must be given full faith and credit in Oklahoma. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295 (W.D. Okla. 2006), *aff'd*, 496 F.3d 1139 (10th Cir. 2007).

[13] A New York court recently affirmed the legality of a post-nuptial agreement between two men who were married in Massachusetts, even though the court acknowledged the marriage was invalid. *Gonzalez v. Green*, 831 N.Y.S.2d 856 (N.Y. Sup. Ct. 2006).

## II.

## A PERVASIVE CONFLICT EXISTS AMONG THE STATES CONCERNING THE PARENTAL RIGHTS OF FIT, BIOLOGICAL PARENTS.

A significant conflict exists among the state courts regarding the constitutional rights of a fit, biological parent to prevent a parentage declaration over her child in favor of a legal stranger. The Vermont order, which the Virginia Court of Appeals concluded must be given full faith and credit, treats Janet as a parent to Isabella simply because she was in a same-sex civil union with Lisa at the time Isabella was born. That decision is one of the latest in a pervasive split among the states concerning the rights of fit, biological parents.

On the one hand, courts in at least sixteen states disregard the constitutional rights of parents in the face of claims to parentage or visitation by third parties, declaring the third parties *de facto* or psychological parents. Vermont, for example, declared Respondent a parent to Lisa's child without performing any constitutional analysis or affording the biological parent's preference any weight. Rather, after creating a new parentage rule and then declaring Janet a parent, the court summarily concluded that Janet's constitutional rights were coextensive with Lisa's. *Miller-Jenkins*, 2006 VT 78 at ¶ 59. On the other hand, courts in at least twelve states have affirmed the rights of fit, biological parents to direct the upbringing of their children in

the face of third-party claims to parentage or visitation. *See, e.g., Jones v. Barlow*, 154 P.3d 808, 818 (Utah 2007) (de facto parent doctrine interferes with a parent's right to direct the upbringing of her child).

In the past two years alone, appellate courts in at least fifteen states have wrestled with the fundamental rights of parents in third-party parentage or visitation cases – twelve of which involved disputes between same-sex couples.[14] This Court should grant the petition to clarify the rights of fit, biological parents after *Troxel v. Granville*, 530 U.S. 57, 98 (2000) in the face of claims to *parentage* by legal strangers.

For nearly 100 years, this Court has protected a parent's liberty interest in making decisions concerning her child's upbringing. A parent's fundamental right has been described as "perhaps the oldest of the fundamental liberty interests." *Troxel*, 530 U.S. at 65. Whether recognized as one of

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[14] *See Elton H. v. Naomi R.*, 119 P.3d 969 (Alaska 2005); *Robinson v. Ford-Robinson*, 2005 WL 1041158 (Ark. 2005); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. 2005); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005); *B.F. v. T.D.*, 194 S.W.3d 310 (Ky. 2006); *McDermott v. Dougherty*, 869 A.2d 751 (Md. 2005); *In re R.A.*, 2005 WL 3556087 (N.H. 2005); *Harrold v. Collier*, 836 N.E.2d 1165, 1172-73 (Ohio 2005); *Jones v. Jones*, 884 A.2d 915 (Pa. Super. Ct. 2005); *Peters v. Costello*, 2005 WL 3578115 (Pa. 2005); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007); *Britain v. Carvin*, 122 P.3d 161 (Wash. 2005); *Clifford K. v. Pauls S.*, 619 S.E.2d 138 (W. Va. 2005).

the rights retained under the Ninth Amendment or a Fourteenth Amendment liberty interest, "[i]t is cardinal . . . that the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Commonwealth of Mass.*, 321 U.S. 158, 166 (1944). "The child is not the mere creature of the state . . . ." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

Rejecting a claim brought by grandparents seeking visitation with their grandchildren, *Troxel* stated that, "so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." 530 U.S. at 68-69. Consistent with *Troxel*, both Virginia and Vermont have generally refused to grant third party visitation over the objections of a fit, biological parent *absent a showing of harm*. *See Craven v. McCrillis*, 868 A.2d 740, 742-43 (Vt. 2005); *Williams v. Williams*, 501 S.E.2d 417, 418 (Va. 1998).

Here, however, Vermont declared Respondent a parent without *any* inquiry into harm to the child or Petitioner's constitutional rights. If a visitation order cannot be granted without a showing of harm in Virginia and Vermont, then *a fortiori* a parentage order should be subject to an even more stringent standard. The Vermont order unconstitutionally interfered with Lisa's decision as the fit, biological

parent on how to raise her child.[15] Virginia, in requiring that the decision be given full faith and credit, committed the same constitutional error.

The constitutional violation is manifest given Vermont's creation of a new parentage rule from the bench, which it then applied to Petitioner's case. Specifically, in its decision declaring Janet a parent of Isabella, the Vermont trial court explained that no Vermont court had yet addressed the question of how to determine parentage of children born by assisted reproductive technology. (App. 92a). Existing Vermont law, however, did plainly provide that a same-sex partner could be considered a parent, but *only if she utilized the step-parent adoption process.* Nevertheless, the Vermont court held that

> where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as part of a family unit, not by biology.[16]

(App. 94a). In creating this new parentage rule, both

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[15] Nor can Janet be characterized as one with whom the child has developed a "substantial relationship." *See Troxel*, 530 U.S. at 98-99 (Kennedy, J., dissenting). Janet and Lisa separated when the child was only seventeen months old. (App. 2a).

[16] This judicially-created test is much broader than even that offered by the ALI, which provides that before a person can be declared a *de facto* parent, she must have lived with the child for a "significant period of time . . . *not less than two years* . . . ." ALI Principles of the Law of Family Dissolution § 2.03(1)(c) (emphasis added).

the family court and Vermont Supreme Court refused to address Lisa's parental rights' claim.[17] Virginia similarly failed to recognize Petitioner's parental rights.

Appellate courts in Florida, Georgia, Illinois, Iowa, Michigan, New Hampshire, New York, North Carolina, Ohio, Tennessee, Texas, and Utah have held that a nonparent does not obtain custodial rights or decision-making authority simply because the nonparent has strong emotional bonds with the

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[17]What makes this case particularly egregious is the overt manner in which the Vermont courts flagrantly ignored existing Vermont law and federal constitutional limitations in order to reach a desired result. Under existing law, Janet could only be a parent to Isabella if she had adopted Isabella. The court ignored that law, creating new law and applying it retroactively to apply to a child *born and conceived in Virginia*. Vermont then refused to apply its marriage evasion statute equally to civil union couples because if it had, the civil union would have been declared void *ab initio*. With no civil union to dissolve, the family court would have lacked subject matter jurisdiction to even entertain Janet's counterclaim. In addition, without proper subject matter jurisdiction, Virginia, not Vermont, would have been considered the first court to issue any ruling in the cases below. The full faith and credit obligations under the PKPA do not apply if the state issuing the order lacked subject matter jurisdiction. The Virginia Court of Appeals, in refusing to independently evaluate Vermont's jurisdiction over the dissolution proceeding, relied on the fact that Lisa consented to *personal* jurisdiction in Vermont and chose Vermont as a forum by filing a *pro se* complaint in Vermont. (App. 14a). That finding mischaracterizes the facts and legal consequences. First, although Lisa could consent to *personal* jurisdiction, she could not confer *subject matter* jurisdiction. *See Colomb v. Columb*, 633 A.2d 689, 693 (Vt. 1993) (rejecting argument that mother waived jurisdictional defect by submitting to the jurisdiction of Vermont courts, explaining that "'subject matter jurisdiction cannot be conferred by agreement or consent of the parties'"). Second, Lisa had no real choice but to file for dissolution in Vermont, even though she was a Virginia resident. She could only dissolve the civil union in Vermont.

natural parent's child. Until the decision in the case below, the Vermont Supreme Court had also refused to recognize custodial rights of third-parties who had not adopted the child. *See Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997); *see, e.g., Kazmierazak v. Query*, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999) (nonparent in same-sex relationship sought parental rights); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001) (fit biological parent may not lose custody to a nonparent unless nonparent proves by clear and convincing evidence that the biological parent is unfit or that the parental custody would cause physical or significant, long term emotional harm to the child); *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. 2005) (refusing to recognize a psychological parent right even when the nonparent was called "daddy" by the children and he had co-parented the children since their birth); *In re Visitation with C.B.L.*, 723 N.E.2d 316 (Ill. App. Ct. 1999) (former same-sex partner was not entitled to visitation); *Petition of Ash*, 507 N.W.2d 400 (Iowa 1993) (former boyfriend not entitled to visitation with biological mother's child); *McGuffin v. Overton*, 542 N.W.2d 288 (Mich. Ct. App. 1995) (mot her's same-sex partner not entitled to visitation or custodial rights over objection of biological father after biological mother died); *In re Nelson*, 825 A.2d 501 (N.H. 2003) (rejecting claim by nonparent to parental rights over objection of fit, biological parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (rejecting claim to visitation by former same-sex partner over objection of fit, biological parent); *Brewer v. Brewer*, 533 S.E.2d 541 (N.C. Ct. App. 2000) (rejecting claim to *de facto*

parent status over objection of fit, biological parent); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (rejecting claim to parental rights over objection of fit, biological parent); *In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (biological mother's former partner in a same-sex relationship had no claim to visitation); *Coons-Andersen v. Andersen*, 104 S.W.3d 630 (Tex. Ct. App. 2003) (rejecting claim by same-sex partner for visitation, explaining that the *in loco parentis* status is temporary, ending when the child is no longer under the *in loco parentis* person's care); *In re J.M.*, 750 A.2d 442 (Vt. 2000) (refusing to judicially expand the definition of parent to include alleged psychological parent); *Jones v. Barlow*, 154 P.3d 808 (Utah 2007).

On the other hand, a number of states grant rights to *de facto* parents, psychological parents, or people who stand *in loco parentis* to the child, over the objection of the child's fit, biological or adoptive parent. These states include Arizona, Arkansas, California, Colorado, Indiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin. *See, e.g.*, *Riepe v. Riepe*, 91 P.3d 312 (Ariz. Ct. App. 2004) (without mentioning *Troxel*, allowing one standing *in loco parentis* to obtain visitation over objections of fit, biological parent); *Robinson v. Ford-Robinson*, 2005 WL 1041158 (Ark. 2005) (rights of stepparent were equal to the fit biological parent under the *in loco parentis* doctrine); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (parental rights and responsibilities granted to former partner in lesbian relationship

with biological mother); *In re E.L.M.C.*, 2004 WL 2377164 (Colo. 2004) (granting former same-sex partner joint parenting time and decision-making authority over objection of fit, biological mother); *In re Parentage of A.B.*, 837 N.E.2d 965 (Ind. 2005) (woman entitled to some rights of visitation to her former same-sex partner's biological child); *C.E.W. v. D.E.W.*, 845 A.2d 1146 (Me. 2004) (finding that once a court determines the nonparent in a same-sex relationship to be a *de facto* parent, court is free to award parental rights over objections of biological parent); *S.F. v. M.D.*, 751 A.2d 9 (Md. Ct. App. 2000) (granting *de facto* status to former same-sex partner over fit, biological parent's objection); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (best interest analysis applies when determining custody between biological parent and *de facto* parent), *cert. denied*, 528 U.S. 1005 (1999); *V.C. v. M.J.B.*, 748 A.2d 539 (N.J. 2000) (psychological parent stands in parity with biological parent), *cert. denied*, 531 U.S. 926 (2000); *A.C. v. C.B.*, 829 P.2d 660 (N.M. Ct. App. 1992) (coparenting agreement between lesbian couple enforceable); *T.B. v. L.R.M.*, 874 A.2d 34 (Pa. Super. Ct. 2005) (rights of persons standing *in loco parentis* are the same as that of biological parent); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (a *de facto* parent has parental rights regardless of *Troxel*); *In re Custody of H.S.H.K.*, 533 N.W.2d 419 (Wis. 1995) (four factor *de facto* parenthood test), *cert denied*, 516 U.S. 975 (1995); *Clifford K. v. Paula S.*, 619 S.E.2d 138 (W. Va. 2005) (adopting Wisconsin's *de facto* parent test).

This pervasive split among the states concerning

the parental rights of fit, biological parents vis-a-vis third parties who seek *parentage* rights has not been, but should be, addressed by this Court.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Mathew D. Staver
*(Counsel of record)*
Anita L. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons
Second Floor
Maitand, FL 32751
(800) 671-1776

Stephen M. Crampton
Rena M. Lindevaldsen
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
100 Mountain View Road
Suite 2775
Lynchburg, VA 24502
(434) 592-7000
*Attorneys for Petitioner*

# APPENDIX A

Court of Appeals of Virginia,
Alexandria.

*49 Va. App. 88, **637 S.E.2d 330

Janet MILLER-JENKINS

v.

Lisa MILLER-JENKINS

Record No. 2654-04-4.
Nov. 28, 2006.

Present: CLEMENTS, J., and WILLIS and ANNUNZIATA, S.J.

WILLIS, JR., Judge.

*91 Janet Miller-Jenkins ("Janet") appeals the October 15, 2004 "Final Order of Parentage" of the Circuit Court of Frederick County ("trial court"). In that order, the trial court held (1) that Lisa Miller-Jenkins ("Lisa") is "the sole biological and natural parent of" IMJ, a minor, (2) that Lisa "solely has the legal rights, privileges, duties and obligations as parent hereby established for the health, safety, and welfare of" IMJ, and (3) that neither Janet "nor any other person has any claims of parentage or visitation rights over" IMJ.

On appeal, Janet contends the trial court erred (1) in failing to recognize that the federal Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. §§ 1738A, barred its exercise of jurisdiction, (2) in holding that the Virginia Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Code §§ 20-146.1 *et seq.*, permitted it to exercise jurisdiction, and (3) in refusing to enforce the June 17, 2004 custody order of the Rutland County, Vermont Family Court ("Vermont court").

We hold that the trial court erred in failing to recognize that the PKPA barred its exercise of jurisdiction. Accordingly, we vacate the orders of the trial court and remand this case with instruction to grant full faith and credit to the custody and visitation orders of the Vermont court.

## I. BACKGROUND

Beginning in the late 1990's, the parties lived together in Virginia. On December 19, 2000, they traveled to Vermont *92 and entered into a civil union pursuant to the laws of that state. *See* Vt. Stat. Ann. Tit. 15, §§ 1201 *et seq.* Thereafter, while residing in Virginia, Lisa was artificially inseminated with sperm from an anonymous donor. In April 2002, she gave birth to IMJ. In August 2002, the parties and IMJ moved to Vermont and established residence there. In September 2003, the parties ended their relationship. Lisa moved to Virginia with IMJ. Janet remained in Vermont.

On November 24, 2003, Lisa filed in the Vermont

court a "Complaint for Civil Union Dissolution." She designated IMJ as "the biological or adoptive" child of the "civil union." She asked the Vermont court to dissolve the civil union, to award her legal and physical "rights and responsibilities for the minor child," to award Janet "suitable parent/child contact (supervised)," and to "award payment of suitable child support money."

On June 17, 2004, the Vermont court entered a "Temporary Order Re: Parental Rights & Responsibilities." In that order, the Vermont court awarded Lisa "temporary legal and physical responsibility for the minor child of the parties," and awarded Janet "on a temporary basis, parent-child contact with the minor child as follows...." The order then listed the specifics of that contact, and in so listing thrice used the word "visitation."

On July 1, 2004, the day Virginia's Marriage Affirmation Act ("MAA"), Code §§ 20-45.3 became law, Lisa filed in the trial court a "Petition to Establish Parentage and for Declaratory Relief." She asserted that she had "sole custody" of IMJ, and asked the court (1) to declare that she was "the sole parent of" IMJ, (2) to rule that she was "to be the sole parent of and to have sole parental rights over" IMJ, (3) to adjudicate any parental rights claimed by Janet "to be nugatory, void, illegal and/or unenforceable," and (4) to award her attorney's fees and costs.

**333 On July 19, 2004, after learning of the petition filed by Lisa in Virginia, the Vermont court entered

the following order:

> *93 This Vermont Court has and will continue to have jurisdiction over this case including all parent-child contact issues. This Court is unaware of any proceeding available in a state that does not recognize a civil union to resolve the issue of this case. This Court will not and cannot defer to a different State that would preclude the parties from a remedy.
>
> The Temporary Order for parent-child contact [is] to be followed. Failure of the custodial parent to allow contact will result in an immediate hearing on the need to change custody.

On July 29, 2004, Janet filed a demurrer to Lisa's Virginia petition. On August 18, 2004, the trial court entered an order (1) recogni zing that Janet was entering a special appearance for the purpose of contesting jurisdiction, (2) directing the parties to file memoranda addressing the question of jurisdiction, and (3) staying all visitation between Janet and IMJ except for supervised visitation in Virginia. Following an August 24, 2004 hearing, the trial court ruled it had jurisdiction pursuant to the MAA and the UCCJEA. It memorialized this ruling in a September 9, 2004 order. [FN1]

Meanwhile, the Vermont court, by order entered September 2, 2004, held Lisa in contempt for refusing to comply with the child visitation terms of its June 17, 2004 order.

On October 15, 2004, the trial court entered the final order in this case, setting forth the holdings delineated in the first paragraph of this opinion.

On appeal by Lisa, the Supreme Court of Vermont ("Vermont Supreme Court") affirmed the judgment of the Vermont court, holding, *inter alia,* that the civil union entered into by Lisa and Janet was valid under Vermont law; that the Vermont *94 court had jurisdiction to dissolve that civil union and to determine all its implications, including the parentage of and parental rights and responsibilities with respect to IMJ; and that the Vermont court acted properly in holding Janet to be a parent of IMJ and in assigning parental rights and responsibilities to her. *Miller-Jenkins v. Miller-Jenkins,* ··· A.2d ····, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ···· 2-3, (Vt. Aug. 4, 2006). It held that PKPA afforded preemptive jurisdiction to Vermont and denied full faith and credit to Virginia orders contradicting those entered by the Vermont court. *Id.* at ····, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ···· 13.

## II. ANALYSIS

### A. *The PKPA*

#### 1. *Statutory History and Analysis*

28 U.S.C. §§ 1738A, commonly referred to as the Parental Kidnapping Prevention Act, carries the following title: "Full faith and credit given to child custody determinations." Subsection (a) of the PKPA reads: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State."

The United States Supreme Court has succinctly summarized the thrust of the PKPA:

> The Parental Kidnap[p]ing Prevention Act (PKPA or Act) imposes a duty on the States to enforce a child custody determination entered by a court of a sister State if the determination is consistent with the provisions of the Act. In order for a state court's custody decree to be consistent with the provisions of the Act, the State must have jurisdiction under its own local law and one of five conditions set out in §§ 1738A(c)(2) must be met. Briefly put, these conditions authorize the state court to enter a custody decree if the child's home is or recently has been in the State, if the *95 child has no home State and it would be in the child's best interest for the **334 State to assume

> jurisdiction, or if the child is present in the State and has been abandoned or abused. Once a State exercises jurisdiction consistently with the provisions of the Act, no other State may exercise concurrent jurisdiction over the custody dispute, §§ 1738A(g), even if it would have been empowered to take jurisdiction in the first instance, and all States must accord full faith and credit to the first State's ensuing custody decree.

*Thompson v. Thompson,* 484 U.S. 174, 175-77, 108 S.Ct. 513, 514-15, 98 L.Ed.2d 512 (1988) (footnotes omitted).

The PKPA had its genesis in the confusion concerning the applicability of the full faith and credit doctrine, 28 U.S.C. §§ 1738, to child custody orders. *See Thompson,* 484 U.S. at 180, 108 S.Ct. at 516-17. Indeed, "a parent who lost a custody battle in one State had an incentive to kidnap the child and move to another State to relitigate the issue." *Id.* Yet, despite its unofficial and common title, the PKPA is not limited to parental kidnapping cases.

"[T]he principal problem Congress was seeking to remedy was the inapplicability of full faith and credit requirements to custody determinations.... The sponsors and supporters of the Act continually indicated that the purpose of the PKPA was to provide for nationwide enforcement of custody orders

made in accordance with the terms of the UCCJA [FN2].... *Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations....*"

*Scott v. Rutherfoord,* 30 Va.App. 176, 187, 516 S.E.2d 225, 231 (1999) (quoting *Thompson,* 484 U.S. at 181, 183, 108 S.Ct. at 517-518) (emphasis added). *See also Wilson v. Gouse,* 263 Ga. 887, 441 S.E.2d 57, 60 (1994) ("the PKPA was intended not only to apply where a child was abducted by a parent and removed to another state but to remedy what was widely *96 considered to be the inapplicability of the full faith and credit statute to child custody orders" (footnote omitted)).

[1] Moreover, it is well settled that the PKPA preempts any conflicting state law. *See Meade v. Meade,* 812 F.2d 1473, 1476 (4th Cir.1987) ("The PKPA quite simply preempts conflicting state court methods for ascertaining custody jurisdiction."). *See also Murphy v. Woerner,* 748 P.2d 749, 750 (Alaska 1988); *Delk v. Gonzalez,* 421 Mass. 525, 658 N.E.2d 681, 684 (1995); *In re Clausen,* 442 Mich. 648, 502 N.W.2d 649, 673-74 (1993); *In re Relationship of Henry,* 326 Or. 166, 951 P.2d 135, 138 (1997); *State ex rel. Conforti v. Wilson,* 203 W.Va. 21, 506 S.E.2d 58, 62 (1998); *Michalik v. Michalik,* 172 Wis.2d 640, 494 N.W.2d 391, 394 (1993).

[2] Pursuant to Vt. Stat. Ann. tit. 15, §§ 1206, [FN3] Lisa filed a "Complaint for Civil Union Dissolution"

with the Vermont court on November 24, 2003. By doing so, she placed before the Vermont court the issues of the parties' legal and physical "rights and responsibilities" concerning IMJ and "suitable parent/child contact." In Vermont, the term "parental rights and responsibilities" means "the rights and responsibilities related to a child's physical living arrangements, parent child contact, education, medical and dental care, religion, travel and any other matter involving a child's welfare and upbringing." Vt. Stat. Ann. tit. 15, §§ 664(1). And the term "parent child contact" means "the right of a parent who does not have physical responsibility to have visitation with the child." Vt. Stat. Ann. tit. 15, §§ 664(2).

[3] In reviewing the applicability of the PKPA to the trial court's action, we are guided by the wording of the statute. "A principal rule of statutory interpretation is that courts will give statutory language its plain meaning." *Davenport v. Little-Bowser,* 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005). At its threshold, the PKPA requires that a court making a child custody or visitation determination have "jurisdiction *97 under the law of such State." 28 U.S.C. §§ 1738A(c)(1). The Vermont Supreme Court held that the Vermont court had jurisdiction under the **335 laws of Vermont over the case initiated by Lisa's complaint. *See* Vt. Stat. Ann. tit. 15, §§ 1206. We are bound by that holding. *See* 28 U.S.C. §§ 1738A(a) and (g).

Furthermore, Code §§ 28 U.S.C. 1738A(c)(2)(A)(ii) sanctions the Vermont court's exercise of jurisdiction. That subsection applies where a state "had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State." *Id.* The parties lived together in Vermont until September 2003, when Lisa and IMJ moved to Virginia. Janet continued to live in Vermont. Lisa commenced the Vermont proceeding to dissolve the civil union in November 2003, two months after Vermont ceased to be IMJ's "home state, due to her having been removed from that state" by Lisa.

Because the Vermont court acquired jurisdiction over the issues of custody and visitation, subsections (g) and (h) of the PKPA governed the trial court's ability to entertain Lisa's petition. Those subsections read:

A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

A court of a State may not modify a visitation determination made by a co urt of another State unless the court of the other State no longer has jurisdiction to modify such determ ination or has

declined to exercise jurisdiction to modify such determination.

28 U.S.C. §§ 1738A(g) and (h).

The proceeding in the Vermont court was pending when Lisa filed her petition in the trial court. The Vermont court was then exercising its jurisdiction under Vermont law and *98 consistently with the provisions of the PKPA. Thus, subsection (g) applied. The Vermont court, by virtue of its June 17, 2004 and July 19, 2004 orders, continued to exercise jurisdiction, giving application to subsection (h). Therefore, under a "plain meaning" statutory analysis, the trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and visitation orders of the Vermont court.

2. *Lisa's Position*

Lisa posits three arguments why the PKPA did not preclude the trial court from exercising jurisdiction over her petition.

a. Application of Vermont Law

First, Lisa argues that "to the extent the Vermont order constitutes a visitation determination, the Virginia court properly exercised jurisdiction because the Vermont order was not properly made." Specifically, Lisa contends the Vermont court could not grant "parent child contact" to Janet because it did not first determine that Janet was a parent. The Vermont Supreme Court rejected this argument.

*Miller-Jenkins,* ··· A.2d at ····, 2006 WL 2192715, 2006 Vt. LEXIS 159, at ···· 55. Furthermore, Lisa makes this contention despite the fact that she alleged in her "Complaint for Civil Union Dissolution" that IMJ was "the biological or adoptive child[ ] of said civil union," and despite the fact that the Vermont court in its June 17, 2004 order specifically found that IMJ was "the minor child of the parties."

Lisa cites no authority, and we know of none, that permits us to rule that the supreme court of another state incorrectly interpreted its own law. The contrary is well established: "This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Court of the State have given to those laws." *Elmendorf v. Taylor,* 23 U.S. (10 Wheat.) 152, 159, 6 L.Ed. 289 (1825).

*99 b. Custody or Visitation Determination

[4] Second, Lisa argues: "Even if the Vermont court properly made an initial custody determination within the meaning of the PKPA, the Virginia court properly exercised jurisdiction over the parentage action filed in Virginia." Specifically, Lisa contends the **336 Virginia parentage action is not a custody or visitation determination per the PKPA. Yet, Lisa's petition to the trial court prays that she be adjudicated as having "sole parental rights" over IMJ and that Janet's claim to "parental rights" be adjudged "nugatory, void, illegal and/or unenforceable."

Lisa's complaint in the Vermont court asserted that IMJ was "the biological or adoptive" child of the civil union. She asked that court to award Janet "suitable parent/child contact" and to "award payment of suitable child support money." She thus submitted the determination of IMJ's parentage to the jurisdiction of the Vermont court. Its resolution of that issue has been affirmed by the Vermont Supreme Court and is final.

Whatever semantical machinations are involved, any common understanding of the term "parental rights" includes the right to custody, *see Szemler v. Clements,* 214 Va. 639, 643, 202 S.E.2d 880, 884 (1974) ("Parental rights of custody are founded upon the strong presumption that the best interests of the child will be served by placing it in the custody of its natural parents."), and visitation, *see* Peter N. Swisher, Lawrence D. Diehl & James R. Cottrell, *Virginia Practice Series: Family Law: Theory, Practice, and Forms* §§ 15.8 (2004 ed.) ("The right of a non-custodial parent to the company and society of his or her child is well established. Barring gross unfitness which jeopardizes the well being of the child, visitation is a presumed entitlement."). *See also L.A.M. v. State,* 547 P.2d 827 (Alaska 1976). [FN4] We therefore reject the contention *100 that Lisa's "parentage action" is not a custody or visitation determination embraced by the PKPA.

c. DOMA and the MAA

Third, Lisa argues: "Even if the Vermont court properly made an initial custody determination

within the meaning of the PKPA, and the Virginia order is somehow construed as a visitation or custody determination, the Virginia court properly exercised jurisdiction over the matter by virtue of the federal Defense of Marriage Act and the [Virginia] Marriage Affirmation Act."

DOMA reads:

> No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or right or claim arising from such relationship.

28 U.S.C. §§ 1738C.

[5] Lisa argues that DOMA, enacted in 1996, effectively trumps the PKPA, enacted in 1980, thus enabling the trial court to exercise jurisdiction over Lisa's petition. We disagree.

[6] [7] Lisa cites no authority holding that either the plain wording of DOMA or its legislative history was intended to *101 affect or partially repeal the PKPA. Therefore, any Congressional intent to repeal must be by implication. However, "[r]epeal by implication

is not favored and the firmly established principle of law is that where two statutes are in apparent conflict, it is the duty of the court, if it be reasonably possible, to give to them such a construction as will give force and effect to each." *Scott v. Lichford,* 164 Va. 419, 422, 180 S.E. 393, 394 (1935).

**337 [8] [9] We do not read the two statutes to conflict. They can be reconciled. In analyzing the statutes, we are mindful that "[t]he primary objective of statutory construction is to ascertain and give effect to legislative intent. *Turner v. Commonwealth,* 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983). The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction. *Id.*" *Commonwealth v. Zamani,* 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998). As we have noted, " 'Congress' chief aim in enacting the PKPA was to extend the requirements of the Full Faith and Credit Clause to custody determinations.' " *Scott,* 30 Va.App. at 187, 516 S.E.2d at 231 (quoting *Thompson,* 484 U.S. at 183, 108 S.Ct. at 518). DOMA has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.

H.R.Rep. No. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906. *See also id.* at 18, *reprinted*

*in* 1996 U.S.C.C.A.N. at 2922 ("It is surely a legitimate purpose of government to take steps to protect the right of the people, acting through their state legislatures, to retain democratic control over the manner in which the States will define the institution of marriage. [DOMA] advances this most important government interest.").

*102 Nothing in the wording or the legislative history of DOMA indicates that it was designed to affect the PKPA and related custody and visitation determinations. Simply put, DOMA allows a state to deny recognition to same-sex marriage entered into in another state. This case does not place before us the question whether Virginia recognizes the civil union entered into by the parties in Vermont. Rather, the only question before us is whether, considering the PKPA, Virginia can deny full faith and credit to the orders of the Vermont court regarding IMJ's custody and visitation. It cannot. The law of Vermont granted the Vermont court jurisdiction to render those decisions. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the Vermont court. She placed herself and the child before that court and laid before it the assertions and prayers that formed the bases of its orders. By operation of the PKPA, her choice of forum precluded the courts of this Commonwealth from entertaining countervailing assertions and prayers. Lisa argues that the MAA forbade the trial court to extend full faith and credit to the orders of the Vermont court. The MAA reads:

A civil union, partnership contract or other

arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Code §§ 20-45.3.

We need not, and do not, decide whether the MAA applies to this case. If it does, it is preempted by the PKPA. *See, e.g., Meade,* 812 F.2d at 1476 (PKPA preempts conflicting state law).

B. *The UCCJEA*

Janet also contends the trial court erred in holding that the UCCJEA permitted it to exercise jurisdiction in this case. *103 Having determined that the PKPA is the controlling law in this matter and that the PKPA preempts conflicting state law, we need not address that issue.

III. CONCLUSION

We hold that the trial court erred in failing to recognize that the PKPA prevented its exercise of jurisdiction and required it to give full faith and credit to the custody and visitation orders of the Vermont court. By so holding, we do not address whether Virginia law recognizes or endorses same-sex unions entered into in another state or jurisdiction. We do not comment on the

constitutionality, **338 viability or breadth of the UCCJEA and the MAA. We do not consider the merits of the rulings of the Vermont court. Those questions are not before us. The issue before us is the narrow one of jurisdiction. By filing her complaint in Vermont, Lisa invoked the jurisdiction of the courts of Vermont and subjected herself and the child to that jurisdiction. The PKPA forbids her prosecution of this action in the courts of this Commonwealth. Accordingly, we vacate the orders of the trial court and remand this matter to the trial court with instruction to extend full faith and credit to the custody and visitation orders of the Vermont court.

*Vacated and remanded.*
Va.App.,2006.
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FN1. The trial court, in the September 9, 2004 order, also certified the matter for an interlocutory appeal to this Court pursuant to Code §§ 8.01-670.1. Janet noted an appeal. Record No. 2192-04-4. By order entered January 6, 2005, we dismissed that appeal, finding that we lacked jurisdiction pursuant to either Code §§ 8.01-670.1 or Code §§ 17.1-405.

FN2. The Uniform Child Custody Jurisdiction Act, since superceded by the UCCJEA.

FN3. "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions."

FN4. While there is much discussion of parental rights in reported cases, few cases attempt to define those rights making discussion difficult. A careful review of the literature, including case law, treatise and law review, indicates that the following have been listed as "parental rights" protected to varying degrees by the Constitution:

> (1) Physical possession of the child which, in the case of a custodial parent includes the day-to-day care and companionship of the child. In the case of a non-custodial parent, possession is tantamount to the right to visitation.
> (2) The right to discipline the child, which includes the right to inculcate in the child the parent's moral and ethical standards.
> (3) The right to control and manage a minor child's earnings.
> (4) The right to control and manage a minor child's property.
> (5) The right to be supported by an adult child.
> (6) The right to have the child bear the parent's name.
> (7) The right to prevent an adoption of the child without the parents' consent.
> *L.A.M.*, 547 P.2d at 832 n. 13.

## APPENDIX B

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 7th day of May, 2007.

Record No. 070355
Court of Appeals No. 2654-04-4

Lisa Miller-Jenkins,

Appellant,

against

Janet Miller-Jenkins,

Appellee.

From the Court of Appeals of Virginia

Finding that the appeal was not perfected in the manner provided by law because the appellant failed to file the notice of appeal, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:14(a).

A Copy,

Teste:

Patricia L.
Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk

## APPENDIX C

VIRGINIA:
IN THE CIRCUIT COURT OF FREDERICK COUNTY

Chancery No. CH04-280

LISA MILLER-JENKINS,

Petitioner,

v.

JANET MILLER-JENKINS,

Respondent.

Entered September 9, 2004.

ORDER AND CERTIFICATION
FOR INTERLOCUTORY APPEAL

CAME THIS DAY the parties, by counsel, and were heard upon Respondent, Janet Miller-Jenkins' Demurrer to jurisdiction. Respondent contends that the exercise of jurisdiction in this Court regarding the determination of parentage and child custody and visitation is precluded by both the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A, and Virginia's Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), Va. Code Ann. § 20-146.1 *et seq.*, because the Rutland

County Family Court in Vermont already has exclusive and continuing jurisdiction of this matter based on legal proceeding underway in that court involving the dissolution of the parties' civil union.

It is hereby ADJUDGED, ORDERED and DECREED that:

1. This Court can properly exercise jurisdiction in this matter regarding the determination of parentage and parental rights, including custody and visitation;

2. Based on the record before this Court, Petitioner is the biological parent of the minor child, Isabella Miller-Jenkins;

3. Virginia's UCCJEA does not preclude the exercise of jurisdiction because the jurisdiction of this Court is not substantially similar to the jurisdiction of the Vermont Court. Virginia's "Marriage Affirmation Act," Va. Code § 20-45.3, expressly provides that "[a] civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable." Any claim of parentage by Respondent under Vermont law is necessarily based on Respondent's civil union with Petitioner. For the

UCCJEA to preclude the exercise of jurisdiction by this Court, Respondent must be a "person acting as a parent," which the UCCJEA defines as any person other than a parent who "claims a right to legal custody under the laws of this Commonwealth." Va. Code § 20-146.1. Here, Respondent cannot claim a right to legal custody under the laws of this Commonwealth as her claims are based on rights under Vermont's civil union laws that are null and void under Va. Code § 20-45.3;

4. Respondent has objected and excepted to this Court's finding that jurisdiction is proper and has requested certification for interlocutory appeal. This Court holds this matter is appropriate for interlocutory appeal pursuant to Va. Code § 8.01-670.1. It is hereby certified that this Court's holding that neither the PKPA, 28 U.S.C.A. § 1738A, nor the UCCJEA, Va. Code Ann. § 20-146.1 *et seq.*, precludes the exercise of jurisdiction by this Court in this matter, involves a question of law as to which there is substantial ground for difference of opinion, there is no clear, controlling precedent on point in the decisions of the Supreme Court of Virginia or the Court of Appeals of Virginia, determination of whether jurisdiction can be properly exercised by this Court will be dispositive of this matter, and this Court and the parties agree it is in the parties' best interest to seek interlocutory appeal;

5. This Court's temporary order of August 18, 2004, pertaining to custody of the minor child Isabella Miller-Jenkins shall remain in effect until

modified by this Court; and

6. This matter shall be continued until Thursday, September 9, 2004, to set a trial date.

ENTERED this 9 day of September 2004.

s/John R. Prosser
Hon. John R. Prosser, Judge
Frederick County Circuit Court

SEEN & AGREED TO:

s/Phillip S. Griffin
Phillip S. Griffin II, Esq.
(VSB # 34576)
Peter Thos. Hansen, Esq.
(VSB # 34819)
Phillip S. Griffin II, P.C.
102 South Kent Street
Winchester, VA 22601
*Counsel for Petitioner*

s/Joseph R. Price
Joseph R. Price
(VSB # 40370)
Lisa M. Vollendorf
(VSB # 66044)
ARENT FOX PLLC
1050 Connecticut Ave., NW
Washington, DC 20036-5339
202-775-5769 office
202-857-6395 facsimile
*Counsel for Respondent Janet Miller-Jenkins*

## APPENDIX D

VIRGINIA:
IN THE FREDERICK COUNTY CIRCUIT COURT
IN CHANCERY NUMBER: CH04-280

LISA MILLER-JENKINS,

Petitioner,

vs.

JANET MILLER-JENKINS,

Respondent.

### FINAL ORDER OF PARENTAGE

THE suit to establish parentage pursuant to VA Code § 20-49.1 et seq., came before the Court on September 28, 2004 for trial. Phillip S. Griffin, II, Esquire and Peter Thos. Hansen, Esquire appeared for the Petitioner, Lisa Miller-Jenkins. The Respondent, Janet Miller-Jenkins, though she was served notice of the proceedings in person and through her counsel, Joseph R. Price, Esquire, did not appear in person or through her counsel.

THEREUPON, the Court heard argument and took evidence which established that Lisa Miller-Jenkins is the sole parent and biological mother of the minor child, Isabella Miller-Jenkins who was conceived by in vitro fertilization in Virginia, born in

Virginia, and has resided in Virginia for more than six (6) months prior to the date of filing of the Petition for Parentage; that Janet Miller-Jenkins is not a parent of said minor child; and that the health, safety, and welfare of said minor child will best be protected by her biological mother, Lisa Miller-Jenkins, and not by Janet Miller-Jenkins.

UPON CONSIDERATION WHEREOF, it is hereby ADJUDGED, ORDERED, and DECREED that:

1. Petitioner is the sole biological and natural parent of Isabella Miller-Jenkins;

2. Petitioner solely has the legal rights, privileges, duties and obligations as parent hereby established for the health, safety, and welfare of the minor child, Isabella Miller-Jenkins.

3. Neither Respondent nor any other person has any claims of parentage or visitation rights over Isabella Miller-Jenkins.

This matter is hereby ended and to be removed from the court docket. The Clerk of the Circuit Court is directed to forward an attested copy of this Order to all counsel of record and to file these papers among those matters ended.

ENTERED this 15th day of October 2004.

s/John R. Prosser
JUDGE

WE ASK FOR THIS:

s/Peter Thos. Hansen
Phillip S. Griffin II, Esquire
(VSB # 34576)
Peter Thos. Hansen, Esquire
(VSB # 34819)
Phillip S. Griffin II, P.C.
102 South Kent Street
Winchester, VA 22601
Counsel for Petitioner

## APPENDIX E

VIRGINIA: FREDERICK COUNTY CIRCUIT COURT

In Chancery Number: CH05-000336-00
on appeal from
JDR Case No. JJ018902-01-00

LISA MILLER-JENKINS,

Petitioner-Appellant,

v.

JANET MILLER-JENKINS,

Respondent-Appellee.

ORDER DECLINING
REGISTRATION OF VERMONT ORDER

THE request by Respondent to register in Virginia the June 17, 2004 Temporary Order re: Parental Rights and Responsibilities (the "Vermont Order") came before me on November 16, 2005. The Vermont Order granted Respondent parent-child contact with Isabella, who is Petitioner's biological child. By order dated October 15, 2004, this court decreed that Petitioner is the sole biological and natural parent of Isabella, and that, as a result, neither "Respondent nor any other person has any claims of parentage or visitation rights over Isabella."

By order dated August 8, 2005, the Juvenile and Domestic Relations District Court, Frederick County registered the Vermont Order over Petitioner's objections. Petitioner contends that the Vermont Order cannot be registered in Virginia for four reasons. First, Petitioner contends that the Vermont Order, which grants Respondent parent-child contact with Petitioner's biological child *directly conflicts* with this court's October 15, 2004. Second, Petitioner contends that registration by this court of the Vermont Order is prohibited by the Marriage Affirmation Act, VA. Code § 20-45.3. Registration of the Vermont Order, which grants Respondent parent-child contact is a right arising out of a civil union: Virginia treats civil unions as void in all respects. Third, Petitioner contends that the Vermont Order cannot be registered because the Vermont court lacked subject matter jurisdiction to issue the order. Fourth, Petitioner contends that registration and enforcement of the Vermont Order would infringe Petitioner's constitutional rights as the fit, biological parent over her child.

Respondent contends registration of the Vermont Order in Virginia does not conflict with this Court's October 15, 2004 order because Respondent asserts that she seeks to register the Vermont Order, but not to attempt to enforce it before the Virginia Court of Appeals rules on the pending appeal of this court's October 15, 2004 order. Respondent also contends that the Marriage Affirmation Act does not prohibit registration of the Vermont Order because the Act does not apply to custody disputes. Finally,

Respondent contends that the courts in Vermont, not Virginia, must determine whether the Vermont Order infringes Petitioner's substantive due process rights under the federal constitution. Having fully considered the arguments presented by Petitioner in her opening and reply briefs, and the arguments presented by Respondent in her responsive brief,

It is hereby ADJUDGED, ORDERED and DECREED that:

1. The Vermont Order cannot be registered in Virginia because it is in direct conflict with this Court's October 15, 2004 order, which adjudged, ordered, and decreed that Petitioner is the sole biological and natural parent of Isabella, and, therefore, Respondent had no standing to assert a claim of parentage or visitation over Isabella Miller-Jenkins.

2. The Vermont Order cannot be registered in Virginia because Vermont lacked subject matter jurisdiction to issue the June 7, 2004 Temporary Order re: Parental Rights and Responsibilities.

3. The Vermont Order cannot be registered in Virginia because it contravenes the public policy and direct statutory law of Virginia.

4. The August 8, 2005 order of the Juvenile and Domestic Relations District Court registering the Vermont Order is reversed.

This matter is hereby ended and to be removed from the court docket. The Clerk of the Circuit Court is directed to forward an attested copy of this Order to all counsel of record and to file these papers among those matters ended.

ENTERED this 1st day of March, 2006.

s/John R. Prosser
JUDGE

WE ASK FOR THIS:

s/Rena M. Lindevaldsen
LIBERTY COUNSEL
Rena M. Lindevaldsen
VA Bar # 70697
Suite 2775
100 Mountain View Road
Lynchburg, VA 24502
Telephone: (434) 592-3369
Telefacsimile: (434) 582-7019

Mathew D. Staver
Second Floor
1055 Maitland Center
Commons
Maitland, FL 32751-7214
Telephone: (800) 671-1776
Telefacsimile: (407) 875-0770

Attorneys for Petitioner

SEEN AND OBJECT TO:

s/Joseph R. Price
Joseph R. Price
VA Bar # 40370
Arent Fox PLLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
202-775-5769 (O); 202-857-6395 (F)

# APPENDIX F

STATE OF VERMONT
RUTLAND COUNTY, SS

RUTLAND FAMILY COURT
DOCKET NO. F454-11-03 Rddm

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant.

Filed June 17, 2004.

## TEMPORARY ORDER
## RE: PARENTAL RIGHTS & RESPONSIBILITIES

This matter came on for hearing before the Family Court on March 15, 2004, and again on May 26, 2004, the Honorable William D. Cohen presiding. The Plaintiff was present in Court and represented by her attorney, Judy G. Barone, and the Defendant was present in Court and represented by her attorney, Theodore A. Parisi, Jr. Based on the pleadings and papers on file in this matter, the representations of counsel and the evidence adduced at said hearing, it is hereby ORDERED, ADJUDGED

and DECREED as follows:

1. The Plaintiff is awarded temporary legal and physical responsibility for the minor child of the parties, to wit: Isabella Ruth Miller-Jenkins, DOB 04/16/02.

2. The Defendant is awarded, on a temporary basis, parent-child contact with the minor child as follows:

a) JUNE 2004: From 06/04/04 through 06/06/04, and again on 06/18/04 through 06/20/04. Both visitations shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact, and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to Plaintiff's residence.

b) JULY 2004: From 07/25/04 through 07/31/04. Visitation shall occur in Virginia and the Defendant shall be responsible for transporting the child from the Plaintiff's residence to the situs of parent-child contact and the Plaintiff shall be responsible for transporting the child at the end of parent-child contact period from the situs of Defendant's parent-child contact to Plaintiff's residence.

c) AUGUST 2004 and THEREAFTER:

The Defendant shall have parent-child contact with Isabella in Vermont for the third full week of each month, beginning in August of 2004. Said visitation shall begin on a Saturday morning and end on Sunday evening. The Defendant shall be responsible for transporting the child from the Plaintiff's home in Winchester, Virginia, to her home in Fair Haven, Vermont, and the Plaintiff shall be responsible for transporting the child at the end of the parent-child contact period from Defendant's residence in Fair Haven, Vermont, to her residence in Winchester, Virginia.

d) OTHER TRANSPORTATION ARRANGEMENTS: Other transportation arrangements may be made by the parties provided that each parent shall equally share the burden of such transportation. This Court has no preference for the mode of transportation and the parties may agree that travel by automobile, plane or train may be appropriate.

e) TELEPHONE CONTACT: The Plaintiff shall be permitted to have telephone contact with Isabella while she is with the Defendant once per day. The Plaintiff and Defendant will work out an appropriate time for such telephone contact having in mind Isabella's schedule. The Defendant shall have telephone contact with Isabella on a per-day basis when the child is with the Plaintiff. Similarly, the Plaintiff and Defendant shall work out a time when such contact shall take place and be appropriate considering Isabella's schedule.

3. This Order shall remain in effect until superceded by another Order of this Court dealing with parental rights and responsibilities.

Dated at Rutland, Vermont, this 17 day of June, 2004.

s/William Cohen
Judge(s)- Rutland Family Court

# APPENDIX G

STATE OF VERMONT
RUTLAND COUNTY, SS

RUTLAND FAMILY COURT
DOCKET NO. 454-11-03

LISA MILLER-JENKINS,

Plaintiff,

v.

JANET MILLER-JENKINS,

Defendant.

Filed November 17, 2004.

## RULING ON PLAINTIFF'S MOTION TO WITHDRAW WAIVER TO CHALLENGE PRESUMPTION OF PARENTAGE

Plaintiff and defendant are parties to a Vermont civil union seeking dissolution of that union. The present dispute concerns this court's temporary order of parental rights and responsibilities concerning the minor child IMJ, born during the parties' civil union. The matter presently before the court is Plaintiff Lisa Miller-Jenkins' motion to withdraw a "waiver" to challenge the presumption of

Defendant Janet Miller-Jenkins' status as a parent of the minor child IMJ. FN1

Procedural Facts

The procedural facts and history of this case are both relevant to the motion and necessary to understand the context of these proceedings. Lisa initiated the action in this court by filing a complaint for civil union dissolution on November 24, 2003. In her pro se complaint, Lisa listed IMJ as a biological or adoptive child of the civil union. She requested that the court dissolve the civil union, award her legal and physical rights and responsibilities for IMJ, award Janet suitable parent/child contact (supervised), and award payment of child support. Janet requested a temporary order on the issues of parental rights and responsibilities, parent-child contact and property division. Janet also filed an answer and counterclaim, acknowledging that IMJ was a child of the civil union, and seeking that the court award legal and physical rights and responsibilities to her and give Lisa suitable parent/child contact.

Lisa's first attorney, Linda Reis, entered an appearance on Lisa's behalf on January 9, 2004. The hearing for a temporary order was set for February 25, 2004, and then rescheduled for March 15, 2004 on the plaintiff's request that there was not enough time allocated on the February date. A few days prior to the March hearing, Attorney Reis moved to withdraw as Lisa's attorney, stating that Lisa had hired other

counsel and instructed her to discontinue work on her case. This court granted the motion conditioned upon the temporary hearing scheduled for March 15 not being continued. Lisa's second attorney, Deborah Lashman, entered an appearance on Lisa's behalf on March 12, 2004.

In a prior status conference, Attorney Reis had raised the question of parental status in the civil union context. At the start of the March 15 hearing, the court asked whether Lisa was still raising that as an issue. Attorney Lashman responded that her interpretation of the law was different from Attorney Reis', and that she believed that because the child was born of the civil union, the presumption was that both parties were legal parents. In answer to the court's inquiry, Attorney Lashman represented that her client was waiving the issue. The court proceeded with the hearing. This discussion took place in the courtroom, on the record, while Lisa was present.

Although the March 15 hearing on the temporary order lasted several hours, testimony was not completed. The matter was continued and scheduled for completion on May 26. On May 3, Attorney Lashman moved to withdraw on the grounds of a "material breakdown" in the attorney/client relationship. She also sent to the court a notice of pro se appearance signed by Lisa. On May 14, Lisa filed a motion form with the court asking that Janet be held in contempt of a prior order relating to property issues and requesting a hearing for the purpose of revoking her waiver to challenge

parentage. On May 17, Lisa moved to continue the May 26 hearing on the temporary order. The court denied the motion. On May 26, the day of the continued hearing, Lisa's third attorney, Judy Barone, entered an appearance on Lisa's behalf and filed a "Motion to Withdraw Waiver to Challenge Presumption of Parentage." The court declined the request to halt the proceedings and testimony resumed, which resulted in a temporary order granting Lisa sole physical and legal custody and granting Janet parent-child contact. Lisa's motion regarding the "waiver" was set for a hearing before the court on August 24.

The motion asks the court to determine whether Lisa's "waiver" of the parentage issue through her second counsel was valid. Lisa's claim is that her second counsel waived the issue without her knowing consent and without an adequate explanation of how the law in Vermont would apply to the facts of this case. While the "waiver" itself is the focus of the motion before the court, the particular relief sought by Lisa's motion and the legal arguments put forth by Lisa in support of such relief require the court to examine the law of parentage applicable to the facts of this case.

The motion filed on the second day of the temporary hearing sought a discontinuation of the proceedings and asked for time for counsel to brief the court on the "matter of Plaintiff's rebuttal to the presumption of parentage." Plaintiff's request at the hearing, and in subsequent motions, was not simply

to have an opportunity to present evidence to rebut a presumption of parentage prior to a final hearing in this case. Rather, she requested that the court postpone the proceedings that had already been delayed more than two months and decline to enter any order of temporary visitation. This request was denied. Subsequently, plaintiff has requested that the court set aside its temporary order – thereby curtailing any enforceable right of Janet to have parent-child contact and depriving her of any parental interest – until such time that the court has an opportunity to hear and render a determination on whatever factual evidence Lisa might have to rebut this presumption.

Moreover, Lisa has raised legal arguments as to whether any presumption of parentage could apply to the facts of this case and whether the court even has jurisdiction to determine parentage where Janet has not initiated a parentage action. The nature of Lisa's arguments leads the court to conclude that Lisa's challenge to Janet's status as a parent is a question of law, rather than one of disputed facts. Thus, the court will first attend to the legal arguments based on the facts of this case before considering the merits of Lisa's motion and her request for relief.

Background Facts

While the court has not taken evidence specifically in the context of a "parentage" hearing, both parties testified extensively at the hearing on

the temporary custody order about their relationship and the conception of IMJ. The following facts were evident from the testimony of the parties, and do not appear to be disputed:

1. The plaintiff Lisa Miller-Jenkins is currently a resident of the Commonwealth of Virginia.

2. The defendant Janet Miller-Jenkins is currently a resident of the State of Vermont.

3. In December of 2000 while both plaintiff and defendant were residents of Virginia they traveled to Vermont and obtained a civil union.

4. Both parties entered the civil union freely and voluntarily and did so to create a legal commitment to each other.

5. Both parties returned to Virginia as spouses.

6. The parties made a joint decision to employ artificial (alternative) insemination in order to have a child and to have a family.

7. This decision was jointly made and agreed to by both parties while they were legally connected by the civil union.

8. The parties made a joint decision to have Lisa be the bearing mother.

9. Both parties participated in the selection process of an anonymous sperm donor through a sperm bank.

10. Both parties participated in the decision to have the sperm donor's physical characteristics resemble those of the non-bearing mother, Janet.

11. Lisa became pregnant through the use of the sperm bank procedure and gave birth to IMJ on April 16, 2002.

12. Janet was present for the entire delivery and cut the umbilical cord.

13. The child was born while both parties were united by civil union.

14. The artificial insemination took place in Virginia.

15. The child was delivered in Virginia.

16. The parties made a joint decision to relocate from Virginia to the State of Vermont to raise IMJ because of Vermont's Civil Union law and its rights, privileges and responsibilities. The decision to relocate was also due to the perceived inhospitality of the Commonwealth of Virginia to a same-sex couple with a child.

17. The parties moved to Vermont in August of 2002.

18. Both parties resided in Vermont until they separated in September of 2003. At that time, Lisa moved back to Virginia.

19. Janet Miller-Jenkins is not a biological parent of IMJ.

20. Janet Miller-Jenkins did not adopt IMJ.

Discussion

As stated above, the relief sought by the plaintiff and the premise of her argument requires an examination of the law regarding parental status in Vermont. The premise of plaintiff's argument is that there are only two ways in which one can be a parent under Vermont law: a biological connection or adoption. That Janet does not have a biological connection to IMJ and that Janet did not adopt IMJ has never been disputed. FN 2

Under Vermont law, "parties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." 15 V.S.A. § 1204(a). "A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law." Id. § 1204(b). "The law of domestic relations, including annulment, separation

and divorce, child custody and support, and property division and maintenance shall apply to the parties to a civil union." Id. § 1204(d). "The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage." Id. § 1204(f). "The family court shall have jurisdiction over all proceedings relating to the dissolution of civil unions. The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage...." Id. § 1206.

The clear instructions of the Vermont legislature is that this court may not treat parties to a civil union different from parties to a marriage. The court first addresses Lisa's argument that the court does not have jurisdiction to consider the issue of parentage because neither party has initiated a "parentage proceeding" in accordance with 15 V.S.A. §§ 301-308. This assertion ignores the procedural facts of this case. Lisa requested in her signed complaint for civil union dissolution that the court determine the parental rights and responsibilities of the minor child, that the court award her sole physical and legal rights and responsibilities, that the court award Janet parent/child contact and that the court award child support. She also identified the child as a biological or adoptive child of the civil union.

Vermont's statute governing proceedings contains a statement that "a person alleged to be a parent shall be rebuttably presumed to be the natural parent of the child if ... the child is born while the husband and wife are legally married to each other." 15 V.S.A. § 308(4). The presumption that a child born while two people are married is the legitimate child of the marriage has a long tradition in the common law. See Godin v. Godin, 168 Vt. 514, 521 (1998) (noting the statutory presumption in 15 V.S.A. § 308(4) and discussing the origin of the presumption as one of the strongest and most pervasive of presumptions in the common law, citing In re Findlay, 170 N.E. 471, 472 (N.Y. 1930)). From the uncontested assertions in the complaint and answer, as well as the uncontroverted testimony that the child was born while the parties were united in a civil union, the law will presume that the parties to a civil union are the parents of that child, just as the court would so presume the parental status of a married couple initiating a divorce and custody action and acknowledging the child as being born during the marriage. To not recognize the presumption would violate the mandate of the civil union law.

In the context of a child born to a marriage where at least one party requests the court to determine custody and support issues in conjunction with the divorce action, it is incumbent upon the party either denying his or her own status as a parent, or in attempting to deny the parental interest of the other spouse, to initiate that challenge. That is

the benefit of the presumption. Thus, it is not necessary that there be a corresponding parentage action every time the court is asked to determine parental rights and responsibilities with regard to a child born of a marriage. When parentage is not challenged, the result is that the parentage is determined by the nature of the proceedings as a matter of law. See Godin, 168 Vt. at 521. fn 2. In such a case, the court need only determine that the child was born during the marriage.

Lisa argues that Lawrence v. Limoge, 149 Vt. 569, 572-73 (1988), stands for the proposition that this court lacks jurisdiction over the issue of parentage in this case. Lawrence involved an unmarried putative father seeking visitation rights based on the Uniform Child Custody Jurisdiction Act. The Court determined that the trial court lacked jurisdiction over the issue of parentage where the putative father brought the proceeding solely only the basis of the UCCJA, a statute intended to resolve jurisdictional disputes, and not under the Parentage Proceedings Act. Id. However, in this case, Janet is not simply a putative, or "alleged" parent, she is a presumed parent by virtue of the civil union. The court declines to stretch the holding in Lawrence to adopt Lisa's position that the issue of parentage is not implicit in a custody or child support action between parties to a marriage or a civil union involving a child born during the marriage or civil union.

Lisa next argues that the presumption must be

deemed inapplicable based on the facts of this case because it is undisputed that there is no biological connection between Janet and IMJ. This argument depends on a narrow interpretation of Vermont's statute on parentage proceedings. Under Lisa's interpretation, once she established that Janet has no biological connection to IMJ, has not adopted IMJ, and has not completed a "Voluntary Acknowledgment of Parentage form," FN 3 under 15 V.S.A. § 308 there can be no presumption of parentage. The court does not construe the statute to delineate the only ways in which one can be a parent under Vermont law, nor to dictate that the legal presumption can be defeated by genetics alone. See Godin, 168 Vt. at 522 ("Indeed, the presumption of paternity has assumed even greater significance today, as alternative methods of conception unrelated to the 'biology' of the presumed parent have become more common.").

Parties to a civil union who use artificial insemination to conceive a child can be treated no differently than a husband and wife who, unable to conceive a child biologically, choose to conceive a child by inseminating the wife with the sperm of an anonymous donor. The issue of parental status of a child conceived through artificial insemination is one of first impression in Vermont. Under Lisa's interpretation of the law, because there is no established precedent in Vermont, the husband would no more than a mere stepparent and would be required to adopt the child so conceived in order to be considered a parent in the eyes of the law. This argument is without merit.

While Vermont has not yet been presented with the question of parental status concerning a child born during a marriage and conceived through artificial insemination, the issue is not a new one in the common and statutory law of other states. See M. Yaworsky, Annotation, Rights and Obligations Resulting From Human Artificial Insemination, 83 A.L.R. 4th 295, 301 (1991) ("Generally speaking, a husband who consents to the artificial insemination of his wife using sperm from a third-party donor is treated in law as the father of any Child born as a result of the insemination, for all purposes. Where this result is not dictated by statute it has been said to arise by reason of public policy or the principles of equitable or promissory estoppel."). In In re Adoption of Anonymous, 345 N.Y.S.2d 430 (N.Y. Surr. Ct. 1973), for example, a mother asserted that her former husband's consent was not required for her new husband to adopt the child born of the previous marriage on the basis that the former husband was not a parent of the child conceived through artificial insemination. The court disagreed and required the former husband's consent, holding that a child born of artificial insemination of the mother by semen of anonymous third party donor with consent of her husband during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage, and that the husband is a lawful parent of the child. Id. At 435-36. See also People v. Sorensen, 437 P.2d 495, 498 (Cal. 1968) (holding that ex-husband, who consented during the marriage to artificial insemination of his wife with sperm of anonymous sperm donor, was the

lawful father of the child thereby conceived and responsible for support of the child). The Sorensen court reasoned that when a child born of a marriage is conceived by an anonymous sperm donor, there is no "natural" father, and the court can only look for a "lawful" father. Id. at 498

> [A] reasonable man who, because of his inability to procreate, actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport. One who consents to the production of a child cannot create a temporary relationship to be assumed and disclaimed at will, but the arrangement must be of such character as to impose an obligation of supporting those for whose existence he is directly responsible.

Id. at 499.

The court adopts the reasoning of other courts that have determined that where a legally connected couple utilizes artificial insemination to have a family, parental rights and obligations are determined by facts showing intent to bring a child into the world and raise the child as one's own as

part of a family unit, not by biology. As set forth in the facts above, both parties testified that they had the intent to create a family unit when they jointly agreed to the conception of IMJ.

While Lisa may be correct in her assertion that had Janet adopted IMJ this entire issue could have been averted, the question is not whether Janet could have adopted IMJ, but whether the law would require her to do so in order to protect her parental interest. As the legislative findings noted in Vermont's Civil Union Statute state:

> (7) The state has a strong interest in promoting stable and lasting families, including families based upon a same-sex couple.
> (8) Without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships.
> (9) Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for families together, just as do couples who are married under Vermont law.

Legislative Findings, 1999, No. 91 (Adj. Sess.) § 1 (eff. April 26, 2000). This court can not impose a hurdle for a party to a civil union that it would not impose on a married couple. The court sees no reason why a husband choosing to create a family with his wife by utilizing an anonymous sperm donor would be required under Vermont law to initiate an adoption proceeding to protect his rights, and the court can not impose this obstacle upon a party to a civil union who makes that same choice. FN 4

Finally, we reach the question of whether Attorney Lashman's representations that parentage was not an issue and that Lisa "waived" the issue should be set aside and the temporary order vacated. Pursuant to the foregoing analysis, even if this court determines that Lisa should retain the right to challenge Janet's status as a parent, she has not demonstrated that there are any facts requiring judicial resolution that would or could destroy Janet's status as a lawful parent. FN5 The evidence presented at the hearing on this motion consisted of testimony of Lisa's and the various attorneys' understanding of the law, as opposed to any factual basis upon which to rebut the presumption of parentage. This court was justified in proceeding with a hearing already in progress on a temporary order to establish visitation based on the undisputed testimony in this case and the representations of both Lisa and her counsel that IMJ was a child of the civil union and that parentage was not an issue. Lisa has not raised any legal or factual argument that would lead this court to believe that if the issue of

parentage were litigated prior to the temporary order that the outcome would be any different. The court is not persuaded that there is any legal or factual basis to vacate the temporary order granting visitation rights to Janet.

ORDER

Based upon the above this court must recognize a legal parental interest in both parties to this civil union. Parentage by Lisa and Janet was presumed by Vermont law when this matter was filed. Given her own representations and testimony, Lisa has failed to demonstrate that there is any basis for a factual hearing to rebut that presumption. Accordingly, this court will recognize a parental interest in both Lisa and Janet. The temporary order remains in full force and this case is to be set for a final hearing on parental rights, property and child support. FN6

Dated at Rutland, Vermont, this 17th day of November, 2004.

s/William D. Cohen
Hon. William D. Cohen
Family Court Judge

FN1 The court will refer to the parties by their first names for ease of identification and will identify the minor child only by initials.

FN2 The court has previously denied plaintiff's motion to require Janet and IMJ to submit to genetic testing. It has never been disputed that Janet has no "genetic" connection to the child. Plaintiff's motion was simply an extension of her legal argument that Janet cannot be considered a parent without a genetic connection.

FN3 See 15 V.S.A. § 307 (describing a procedure for *unmarried* parents to acknowledge parentage by filing a Voluntary Acknowledgment of Parent form with the department of health).

FN4 It is noteworthy that Vermont law requires the consent of a husband, or a party to a civil union, to any adoption of a child born during a marriage or civil union. See 15 V.S.A. § 2-401 (consent to adoption in Vermont requires consent by the woman who gave birth, the biological father, and "a man who is or has been married to the woman if the minor was born during the marriage"); 15 V.S.A. § 1204(b) (party to civil union included in any terms that denote the spousal relationship, as those terms are used throughout the law.)

FN5 It bears notation that some states have recognized parental and visitation rights of a same-sex partner on the basis that the non-biological partner was a "de facto" parent where the couple utilized artificial insemination to have a family. See, e.g., C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004). This court's decision is not based on Janet's status as a "de facto" parent, which, in jurisdictions that so

recognize such status; typically focuses on the psychological and caretaking role that one has in the child's life. This court's analysis is based on Janet's status as a *legal* parent. See also Titchenal v. Dexter, 166 Vt. 373, 376 n.1 (1997) (distinguishing claims of "de facto" parent and "in loco parentis" as opposed to claim as a legal parent). This court's determination of parental status is based on Janet's role as a party to a civil union in the joint decision to conceive and raise the child during that union, not on her conduct subsequent to the child's birth.

FN6 As discussed in an earlier ruling in this case, the court is aware that Lisa initiated a parentage action in Virginia while the litigation initiated by her in this court was still pending. See Order, Sept. 2, 2004, at 5-6. As discussed above, this court already had jurisdiction over the parentage issue and continues to have jurisdiction over this matter. The exercise of jurisdiction by the Virginia court is not in accordance with the Uniform Child Custody Jurisdiction Act, see 15 V.S.A. §§ 1301 et seq., Va. Code Ann. §§ 20-146.1 et seq. and the federal Parental Kidnaping Prevention Act (PKPA), 28 U.S.C. § 1738A(f). See Order, Sept. 2, 2004, at 5-6. Lisa has also recently filed an action seeking this court to recognize a final order issued by the Virginia court declaring her to be IMJ's sole legal parent and declaring Janet to have no claim of parentage or visitation rights over IMJ. That filing is waiting a response, and will be addressed at a separate time. However, the court notes the full, faith and credit requirement of the United States Constitution, U.S. Const. art. IV, § 1,

only applies where the court issuing the judgment had jurisdiction to enter it. See Poston v. Poston, 160 Vt. 1, 5 (1993) (citing Williams v. North Carolina, 325 U.S. 226, 229 (1942)).

## APPENDIX H

VIRGINIA: In the Court of Appeals of Virginia on Friday the 19th day of January, 2007.

Record No. 2654-04-4 (10-15-04 order)
Circuit Court No. CH04-280

Janet Miller-Jenkins,

Appellant,

against

Lisa Miller-Jenkins,

Appellee.

Upon a Petition for Rehearing En Banc

Before the Full Court

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 28th day of November, 2006 and grant a rehearing *en banc* thereof, the said petition is denied on the grounds that there is no dissent in the panel decision, no member of the panel has certified that the decision is in conflict with a prior decision of the Court, nor has a majority of the Court determined that it is appropriate to grant the petition for rehearing *en banc* in this case. Code § 17.1-402(D).

A Copy,

Teste:

Cynthia L. McCoy,
Clerk

By: *original order signed by a deputy clerk of the Court of Appeals of Virginia at the direction of the Court*

Deputy Clerk

# APPENDIX I

VIRGINIA: In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 22nd day of June, 2007.

Record No. 070355
Court of Appeals No. 2654-04-4

Lisa Miller-Jenkins,

Appellant,

against

Janet Miller-Jenkins,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 7th day of May, 2007 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L.
Harrington, Clerk

By: *original order signed by a deputy clerk of the* Supreme *Court of Virginia at the direction of the Court*

Deputy Clerk

# APPENDIX J

## CONSTITUTION OF THE UNITED STATES

## AMENDMENT XIV

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

# APPENDIX K

## ARTICLE I
## BILL OF RIGHTS

Section 15-A. Marriage.

That only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions.

This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

# APPENDIX L

## UNITED STATES CODE

**28 U.S.C. § 1738. State and Territorial statutes and judicial proceedings; full faith and credit**

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

# APPENDIX M

## UNITED STATES CODE

**28 U.S.C. § 1738A. Full faith and credit given to child custody determinations.**

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term -

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six

consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if -

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State

(i) is the home State of the child on the date of the commencement of the proceeding, or

(ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B)

(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because

(I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such a State, and

(II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and

(i) the child has been abandoned,

or

(ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D)

(i) it appears that no other State

would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and

(ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of

the custody of the same child made by a court of another State, if–

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other Sate is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determ ination or has declined to exercise jurisdiction to modify such determination.

# APPENDIX N

## UNITED STATES CODE

**28 U.S.C. § 1738C. Certain acts, records, and proceedings and the effect thereof**

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.

# APPENDIX O

## VERMONT STATUTES

### 15 V.S.A. § 5 Marriage entered into in another state

If a person residing and intending to continue to reside in the state is prohibited from contracting marriage under the laws of this state and such person goes into another state or country and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state.

# APPENDIX P

## VERMONT STATUTES

### 15 V.S.A. § 6 Marriage void in state of residence

A marriage shall not be contracted in this state by a person residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction. Every marriage solemnized in this state in violation of this section shall be null and void.

# APPENDIX Q

## VERMONT STATUTES

**15 V.S.A. § 1204 Benefits, protections and responsibilities of parties to a civil union**

(a) Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.

(b) A party to a civil union shall be included in any definition or use of the terms "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote the spousal relationship, as those terms are used throughout the law.

(c) Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

(d) The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

(e) The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety);

(2) causes of action related to or dependent upon spousal status, including an action for wrongful death, emotional distress, loss of consortium, dramshop, or other torts or actions under contracts reciting, related to, or dependent upon spousal status;

(3) probate law and procedure, including nonprobate transfer;

(4) adoption law and procedure;

(5) group insurance for state employees under 3 V.S.A. § 631, and continuing care contracts under 8 V.S.A. § 8005;

(6) spouse abuse programs under 3 V.S.A. § 18;

(7) prohibitions against discrimination based upon marital status;

(8) victim's compensation rights under 13

V.S.A. § 5351;

(9) workers' compensation benefits;

(10) laws relating to emergency and nonemergency medical care and treatment, hospital visitation and notification, including the Patient's Bill of Rights under 18 V.S.A. chapter 42 and the Nursing Home Residents' Bill of Rights under 33 V.S.A. chapter 73;

(11) advance directives under 18 V.S.A. chapter 111;

(12) family leav e benefits under 21 V.S.A. chapter 5, subchapter 4A;

(13) public assistance benefits under state law;

(14) laws relating to taxes imposed by the state or a municipality;

(15) laws relating to immunity from compelled testimony and the marital communication privilege;

(16) the homestead rights of a surviving spouse under 27 V.S.A. § 105 and homestead property tax allowance under 32 V.S.A. § 6062;

(17) laws relating to loans to veterans under 8 V.S.A. § 1849;

(18) the definition of family farmer under 10

V.S.A. § 272;

(19) laws relating to the making, revoking and objecting to anatomical gifts by others under 18 V.S.A. § 5240;

(20) state pay for military service under 20 V.S.A. § 1544;

(21) application for early voter absentee ballot under 17 V.S.A. § 2532;

(22) family landowner rights to fish and hunt under 10 V.S.A. § 4253;

(23) legal requirements for assignment of wages under 8 V.S.A. § 2235; and

(24) affirmance of relationship under 15 V.S.A. § 7.

(f) The rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.

# APPENDIX R

## CODE OF VIRGINIA

### § 20-45.3. Civil unions between persons of same sex

A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

# APPENDIX S

## CODE OF VIRGINIA

**§20-158. Parentage of child resulting from assisted conception (in relevant part).**

A. Determination of parentage, generally. - Except as provided in subsections B, C, D, and E of this section, the parentage of any child resulting from the performance of assisted conception shall be determined as follows:

1. The gestational mother of a child is the child's mother.

2. The husband of the gestational mother of a child is the child's father, notwithstanding any declaration of invalidity or annulment of the marriage obtained after the performance of assisted conception, unless he commences an action in which the mother and child are parties within two years after he discovers or, in the exercise of due diligence, reasonably should have discovered the child's birth and in which it is determined that he did not consent to the performance of assisted conception.

3. A donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother.

(2)

No. 07-672

78

IN THE

# Supreme Court of the United States

LISA MILLER-JENKINS,

*Petitioner,*

*v.*

JANET MILLER-JENKINS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

## BRIEF IN OPPOSITION


DEANNE M. OTTAVIANO
*Counsel of Record*
JOSEPH R. PRICE
ARENT FOX LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5339
202-851-6000

REBECCA GLENBERG
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION, INC.
530 E. Main Street, Suite 310
Richmond, VA 23219
(804) 644-8080

GREGORY R. NEVINS
LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC.
730 Peachtree Street NE
Suite 1070
Atlanta, GA 30308
404-897-1880 ext. 230

*Attorneys for Respondent*



213126

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## QUESTIONS PRESENTED

I. Whether the Petition should be granted, where the decision below dismissing the Petition for Appeal rested on an independent and adequate state procedural ground, thus precluding the exercise of *certiorari* jurisdiction?

II. Whether Petitioner has presented compelling reasons to grant the Petition, where the courts of last resort of the two states involved are fully in agreement with one another?

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## INTRODUCTION

The Petition for Writ of *Certiorari* ("Petition") should be denied because the decision below dismissing the Petition for Appeal rested on an independent and adequate state procedural ground. Additionally, the Petition should be denied because Petitioner has presented no "compelling reasons" for a Writ of *Certiorari* to be granted. *See* Sup. Ct. R. 10.

This is an interstate child custody dispute that presents the straightforward question of whether Virginia or Vermont courts have jurisdiction over custody and visitation proceedings pertaining to the minor child, IMJ. On November 28, 2006, a panel of the Court of Appeals of Virginia ("Court of Appeals") held that Vermont had sole jurisdiction over the matter under the Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C.A. § 1738A. *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335 (2006). On January 19, 2007, the Court of Appeals denied Petitioner's request for a rehearing en banc. (Pet. App. 57a-58a.)[1] Petitioner then sought to appeal the Court of Appeal's decision to the Supreme Court of Virginia. However her petition for appeal to the Supreme Court of Virginia was dismissed because Petitioner failed to follow the rules for perfecting her appeal: "[f]inding that the appeal was not perfected in the manner provided by law because the appellant failed to file the notice of appeal, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:14(a)." (Pet. App. 20a-21a). Consequently,

1. Citation is made to the Petition as (Pet. _page no.__) or to the pages of the appendix included in the Petition as (Pet. App. __page no.__).

the Petition for Writ of Certiorari ("Petition") should be denied because the decision below dismissing the Petition for Appeal rested on an independent and adequate state procedural ground.

In addition, Petitioner has failed to establish that there is any "compelling reason" for a Writ of *Certiorari* to be granted. Like the Court of Appeals, a unanimous Supreme Court of Vermont has also concluded that, under the PKPA, Vermont has sole and continuing jurisdiction over this custody matter—a decision this Court already has declined to review. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007). Thus the state courts of last resort are in agreement on this issue, presenting no grounds for a grant of *certiorari*. *See* Sup. Ct. R. 10(b).

For these reasons, the Petition should be denied.

## STATEMENT OF THE CASE

This case began in November 2003, when Petitioner Lisa Miller-Jenkins ("Lisa"), filed a complaint in the Rutland County Family Court in Vermont ("Vermont Court"), to dissolve her Vermont civil union with Respondent Janet Miller-Jenkins ("Janet"), and to adjudicate the parental rights and responsibilities over the couple's child, IMJ. In June 2004, the Vermont Court issued a Temporary Custody Order granting Lisa primary physical custody over IMJ and granting Janet visitation rights. Rather than comply with the June 2004 order of the Vermont Court, Lisa filed a new action in the Frederick County Circuit Court in Virginia ("Virginia Circuit Court"), asking that court to rule that she was

the sole parent and the only person with custodial and other parental rights over IMJ.

The Vermont Court continued to exercise its jurisdiction over the custody and visitation issues and ultimately determined that both Janet and Lisa were legal parents of IMJ, and that Lisa was in contempt of court for refusing to allow Janet visitation with the couple's daughter. On August 4, 2006, a unanimous Supreme Court of Vermont affirmed the Vermont Court's orders. *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951 (Vt. 2006), *cert. denied*, 127 S. Ct. 2130 (2007). From that decision, Lisa sought a writ of *certiorari* from this Court, which was denied on April 30, 2007. *Id.*

In response to Lisa's action in Virginia, on October 15, 2004, the Virginia Circuit Court dismissed out of hand Janet's jurisdictional objections under the Parental Kidnapping and Prevention Act ("PKPA"), 28 U.S.C. § 1738A, and under Virginia law, ruling that Lisa was the only parent of IMJ and that neither Janet "nor any other person has any claims of parentage or visitation rights over [IMJ]."

Janet appealed that decision and, on November 28, 2006, Virginia's intermediate appellate court, the Court of Appeals of Virginia ("Court of Appeals") unanimously reversed the Virginia Circuit Court's assumption of jurisdiction in the case, holding that Vermont had sole jurisdiction over the case pursuant to controlling federal law. In a comprehensive, published opinion, the Court of Appeals applied the jurisdictional criteria in the PKPA to find that Vermont had been IMJ's "home state" within six months of Lisa's filing the Vermont petition and that

Vermont continued to exercise jurisdiction over the case. Accordingly, "the [Virginia] trial court lacked authority to exercise jurisdiction based upon Lisa's custody and visitation action in Virginia or to modify the custody and visitation orders of the Vermont court." *Miller-Jenkins v. Miller-Jenkins*, 49 Va. App. 88, 98, 637 S.E.2d 330, 335 (2006). The Court of Appeals also directed the Circuit Court "to extend full faith and credit to the custody and visitation orders of the Vermont court." *Id.* at 103, 637 S.E.2d at 338. On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing *en banc.* (Pet. App. 57a-58a.) Lisa sought to appeal to the Supreme Court of Virginia, but her appeal was dismissed on May 7, 2007, for her failure properly to perfect her appeal pursuant to the Rules of the Supreme Court of Virginia. (Pet. App. 20a-21a).

## REASONS FOR DENYING THE PETITION

### I. Because The Decision Below Rested On An Independent And Adequate State Procedural Ground, The Petition Should Be Denied.

Lisa's Petition should be denied because the decision below dismissing her Petition for Appeal rested on an independent and adequate state procedural ground, thus precluding this Court from taking certiorari jurisdiction.

While Lisa details her substantive arguments over many pages of her Petition, she omits any discussion of how her Petition could be properly granted when her underlying appeal was dismissed on an independent and adequate state procedural ground—namely Lisa's failure properly to perfect her appeal to the Supreme Court of

Virginia. Lisa attempts to explain away this dispositive fact in a footnote, arguing that the Clerk of the Supreme Court of Virginia's "interpretation of the rules does not appear anywhere in writing and is contrary to the face of the rules." (Pet. 2 n.1.) The simple fact, however, is that Lisa did not comply with the Rules of the Supreme Court of Virginia as understood and applied within that jurisdiction, and her petition for appeal was therefore dismissed.

On November 28, 2006, a unanimous panel of the Court of Appeals held that under the PKPA, Vermont had sole jurisdiction over the custody matter that Lisa had first initiated in Vermont. On January 19, 2007, the Court of Appeals denied Lisa's petition for rehearing en banc. (Pet. App. 57a-58a.) Under Supreme Court of Virginia Rules 5:14 and 5:17, in order to pursue an appeal to the Supreme Court of Virginia, Lisa was required **both** to file her notice of appeal in the Court of Appeals, **and** to file her petiton for appeal in the Supreme Court of Virginia by February 20, 2007, 30 days after the denial of rehearing. Lisa did neither. She did not file a notice of appeal at all. The Supreme Court of Virginia rejected her petition for appeal on that ground, clearly and succinctly stating that it was dismissing the appeal due to Lisa's procedural default: "[f]inding that the appeal was not perfected in the manner provided by law because the appellant failed to file the notice of appeal, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:14(a)." (Pet. App. 20a-21a).[2]

2. Additionaly, Lisa's filing of her Petition for Appeal in the Supreme Court of Virginia was invalid because Lisa used a method of filing not authorized by the rules of the Supreme Court (Cont'd)

Lisa was on full notice of the requirement that she file a notice of appeal. The Supreme Court of Virginia has held for decades that a timely notice of appeal is both mandatory and jurisdictional. *Bd. of Supervisors of Fairfax County v. Bd. of Zoning App. of Fairfax County*, 271 Va. 336, 346, 626 S.E.2d 374, 380 (2006) ("A timely-filed notice of appeal is necessary to confer jurisdiction upon this Court to hear the appeal"); *Super Fresh Food Markets of Va., Inc. v. Ruffin*, 263 Va. 555, 563, 561 S.E.2d 734, 739 (2002) ("this Court lacks jurisdiction to consider any appeal" where timely notice of appeal was not filed); *Vaughn v. Vaughn*, 215 Va. 328, 329, 210 S.E.2d 140, 142 (1974) (rule requiring notice of appeal to be filed 30 days after final judgment is mandatory); *Mears v. Mears*, 206 Va. 444, 445-446, 143 S.E.2d 889, 890 (1965) (same); *Hall v. Hall*, 192 Va. 721, 724, 66 S.E.2d 595, 598 (1951) (same).

Lisa's procedural default is dispositive of her Petition to this Court, as it is well established that this Court will not review a decision below that is based on an independent and adequate state procedural ground. This Court has held specifically in a case arising from Virginia that a petitioner's failure to perfect his or her state court appeal as prescribed by the appellate procedural rules

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(Cont'd)

of Virginia. Because the petition was not sent by registered or certified mail, as provided by Rule 5:5(b), the petition was deemed filed when it arrived at the clerk's office, a day past the deadline, on February 21, 2007. After the clerk informed her that her petition was untimely, Lisa filed a motion asking that the court accept the untimely petition or grant a retroactive extension of time. The court did not grant these motions and instead dismissed her petition. (Pet. App. 20a-21a.)

precludes jurisdiction. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). *Coleman* reiterated the long-established rule that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Id.* (citations omitted.) Jurisdiction is precluded "whether the state law ground is substantive or procedural." *Id.* As is the case here, "[i]n the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional." *Id.* Even where a state intermediate appellate court clearly rests its decision on federal law, review is precluded when the petitioner fails to seek proper review with the state's highest court. *Hammerstein v. Super. Ct. of Ca.*, 341 U.S. 491, 492 (1951).

*Coleman* reflected this Court's longstanding respect for the right of state courts to set forth and enforce their appellate procedural rules:

> Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan v. Bransford*, 139 U.S. 197, 11 S.Ct. 519, 35 L.Ed. 144; *Brown v. Commonwealth of Massachusetts*, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 546; *Jacobi v. State*

> *of Alabama*, 187 U.S. 133, 23 S.Ct. 48, 47 L.Ed. 106; *Hulbert v. City of Chicago*, 202 U.S. 275, 281, 26 S.Ct. 617, 618, 50 L.Ed. 1026; *Newman v. Gates*, 204 U.S. 89, 27 S.Ct. 220, 51 L.Ed. 385; *Chesapeake & Ohio Railway Co. v. McDonald*, 214 U.S. 191, 195, 29 S.Ct. 546, 548, 53 L.Ed. 963.' *John v. Paullin*, 231 U.S. 583, 585, 34 S.Ct. 178, 58 L.Ed. 381.

*Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960). Because Lisa did not comply with "the mode and time of invoking" the jurisdiction of the Supreme Court of Virginia, this Court's precedents preclude a grant of a Writ of *Certiorari.*

## II. Because Vermont And Virginia Have Reached The Same Decision, There Is No Compelling Reason To Grant A Writ Of *Certiorari.*

Because the procedural default below is jurisdictional, an evaluation of the merits of Lisa's position is unnecessary. Nevertheless, assuming *arguendo* that the case had not been decided on an independent and adequate state procedural ground, the Petition should also be denied because Lisa has failed to present any compelling reason warranting a grant of *certiorari.*

Both the Supreme Court of Vermont and the Court of Appeals have unanimously rejected Petitioner's arguments, correctly holding that the PKPA governed the dispute and mandated that Vermont, where Lisa initially filed her custody action, retained jurisdiction

despite Lisa's later efforts to change strategy and file in Virginia. *See Miller-Jenkins*, 912 A.2d at 958-59; *Miller-Jenkins*, 49 Va. App. at 98, 637 S.E.2d at 335.

Both the Supreme Court of Vermont and the Court of Appeals applied the straightforward jurisdictional provisions of the PKPA and reached the same decision: Vermont has jurisdiction. Given that both courts reached the same result, this case is directly opposite the situation contemplated by Rule 10(b) of this Court where state courts of last resort reach conflicting decisions on an important federal question. *See* Sup. Ct. R. 10(b). Here the courts of last resort have reached the *same* conclusion. It is therefore axiomatic that there is no compelling reason present warranting the grant of a Writ of *Certiorari*.

Additionally, even a cursory reading of the questions that Lisa presents to this Court for review demonstrates that the Petition is not worthy of being granted. Lisa presents both highly misleading and irrelevant contentions as part of her attempt to argue issues that are not actually presented by the Virginia proceedings:

- Lisa repeatedly intimates that Janet's parental rights "arose" or were "arising" out of the civil union. (Pet. i, Questions 1, 2, 3.) However, the Supreme Court of Vermont was explicit that it was not recognizing Janet's parental rights based solely on the civil union and in fact that "***[m]any factors*** ... present here ... support a conclusion that Janet is a parent." *Miller-Jenkins*, 912 A.2d

at 970 (emphasis added);[3] *see also id.* at 971 ("Because so many factors are present in this case that allow us to hold that the nonbiologically-related partner is the child's parent, we need not address which factors may be dispositive on the issue in a closer case.").

- In an attempt to bolster the supposed relevance of the Defense of Marriage Act, 28 U.S.C. § 1738C ("DOMA"), Lisa maintains that DOMA was enacted after the PKPA. (Pet. i, Question 2.) Lisa neglects to mention that the PKPA was amended ***after*** DOMA specifically to clarify the PKPA's applicability to visitation orders, which is what is at issue in this case. *See* Pub. Law 104-199 (DOMA) (1996) and Public Law No. 105-374 (1998) (whereby it added in section 1 language that explicitly providing that the PKPA covers initial visitation determinations); *Bruner v. Tadlock*, 338 Ark. 34, 39-40, 991 S.W.2d 600, 603 (1999) (The purpose of Public Law 105-374 was to "make explicit" the commands of the PKPA

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3. The court explained that among the factors demonstrating Janet's parenthood

> are that . . . [i]t was the expectation and intent of both Lisa and Janet that Janet would be IMJ's parent. Janet participated in the decision that Lisa would be artificially inseminated to bear a child and participated actively in the prenatal care and birth. Both Lisa and Janet treated Janet as IMJ's parent during the time they resided together, and Lisa identified Janet as a parent of IMJ in the dissolution petition.

*Miller-Jenkins*, 912 A.2d at 970.

with respect to visitation orders and "hopefully [] "eliminate the hassles, obstacles, and delays that too often confront those who have valid visitation orders and are asking only that federal law be followed," citing 144 CONG. REC. 151, S12941 (daily ed. Oct. 21, 1998).).

- In a further attempt to suggest that this case implicates DOMA, Lisa argues that that law applies to her civil union with Janet, even though a Vermont civil union is not "treated as a marriage," 28 U.S.C. § 1738C, as Lisa herself admits with respect to matters such as the application of Vermont's marriage evasion statute. (Pet. i, Question 3; Pet. 24, n. 11.)

- Lisa attempts to resurrect her claims that the **Vermont** ruling violates her constitutional rights as a parent. (Pet. ii, Questions 4, 5.) Of course, Lisa was obligated to—and already did—raise that issue in her *certiorari* petition from the Supreme Court of Vermont's ruling, which this Court denied.

- Lisa characterizes Janet as a "legal stranger" to IMJ, (Pet. ii, Question 5), when that is precisely the opposite of what the Supreme Court of Vermont held. *Miller-Jenkins*, 912 A.2d at 970.

Consequently, having failed to present any compelling reason for a writ of *certiorari* to be granted, the Petition should be denied.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the Petition.

Respectfully submitted,

DEANNE M. OTTAVIANO
*Counsel of Record*
JOSEPH R. PRICE
ARENT FOX LLP
1050 Connecticut Ave., NW
Washington, DC 20036-5339
(202) 851-6000

GREGORY R. NEVINS
LAMBDA LEGAL DEFENSE
& EDUCATION FUND, INC.
730 Peachtree Street NE
Suite 1070
Atlanta, GA 30308
(404) 897-1880 ext. 230

REBECCA GLENBERG
AMERICAN CIVIL LIBERTIES UNION
OF VIRGINIA FOUNDATION, INC.
530 E. Main Street, Suite 310
Richmond, VA 23219
(804) 644-8080

*Attorneys for Respondent*